IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MARIANNE G. McANDREW,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION NO. 3:CV-01-0317
v.	:	
	:	
MERCY HEALTH PARTNERS,	:	(JUDGE CAPUTO)
	:	
Defendant.	:	

MEMORANDUM

Presently before the Court is Defendant Mercy Health's Motion for Summary Judgment. (Doc. 53.) The motion will be denied because there are material issues of fact as to whether McAndrew was disabled, whether she was a qualified individual, and whether Mercy Health discriminated and/or retaliated against her in violation of the Americans with Disabilities Act. Because the Court will not grant summary judgment for the Americans with Disabilities Act claims, I will also continue to maintain supplemental jurisdiction over the state Workers' Compensation retaliation claim.

BACKGROUND

Marianne McAndrew worked for Mercy Health Partners (hereinafter Mercy Health) for much of her professional career. During the course of her employment, she received several promotions, and she was placed in charge of Outpatient Diabetes Services in 1996 or 1997. McAndrew describes her duties as meeting with patients, both one-on-one and in diabetes education classes, facilitating diabetes support groups, orienting new employees to Mercy Health's diabetes services, marketing the Mercy Health program to the community,

participating in community educational programs, meeting with Mercy Health department heads, attending budget meetings, supervising Regional Diabetes Services operations, both by observing staff as they worked and visiting the various Mercy Health facilities, and other administrative duties. McAndrew's office was located at Mercy Health's hospital in Scranton, Pennsylvania.

As early as 1994, McAndrew was aware that she had an allergy to latex. Starting in 1997, her latex allergy progressively worsened to the point that there was a risk that she could suffer a life-threatening reaction. Although any contact with latex could potentially cause a reaction, McAndrew's reactions were exacerbated by contact with airborne powder from latex gloves. The powder is a threat because small latex particles become stuck to the powder, and when a latex sensitive person breathes in the powder, it often causes a severe reaction in the lungs. McAndrew's attacks, for the most part, present as tightness in her chest, shortness of breath, itchy and teary eyes, and hives. Throughout 1997, McAndrew suffered several latex induced allergy attacks at work. While the exact date is unclear, by December, 1997, McAndrew had approached Mercy Health with a request that the hospital switch from low-powder latex gloves to powder-free latex gloves.

Mercy Health responded to McAndrew's request by holding at least two meetings with McAndrew. The second meeting, held in early February, 1998, was attended by Lisa Baumann, Lena Michael, and Marcella Morgan. The result of the meeting was a decision that McAndrew would avoid patient care areas in the Scranton and Wilkes-Barre hospitals, and the administrators would investigate moving McAndrew's office out of the Scranton hospital.

On April 22, 1998, McAndrew filed a Workers' Compensation claim against Mercy Health for medical bills which were allegedly the result of latex exposure. Around the same time, McAndrew provided Mercy Health with several notes from her doctor and other information on accommodating latex allergies. The information advised that Mercy Health switch from low-powder to powder-free latex gloves.

On June 2, 1998, Baumann met with McAndrew regarding her latex allergy and her work responsibilities. After the meeting, Mercy Health restricted McAndrew to the first floor of the Wilkes-Barre medical building. As part of this change, Mercy Health said that signs would be posted to indicate the first floor as a "latex-restricted area." Mercy Health admits that these signs were not posted until three months after McAndrew was transferred to the site. Mercy Health further instructed McAndrew that if she was found outside of her designated areas, she would be subject to "corrective action." In early July, 1998, McAndrew sent a memorandum to Baumann and Kathy Malcolm expressing her displeasure with the "unreasonable" restrictions to her work environment. Malcolm responded by explaining that the measures were for McAndrew's safety. At the end of July, Mercy Health also instructed McAndrew that she could not travel as part of her job, citing Mercy Health's inability to ensure a latex-safe environment. McAndrew's job title and compensation were unaffected.

In late September, 1998, Mercy Health transferred McAndrew to its Montage building, and again restricted McAndrew's duties by eliminating her contact with patients and attendance at community events. Mercy Health contends that McAndrew retained her supervisory and administrative duties; however, McAndrew contends that her position

became merely administrative. Essentially, Mercy Health eliminated any duties which could cause McAndrew to travel anywhere, or be in a hospital setting. The letter which notified McAndrew of the changes also reiterated the warning that she would be subject to "corrective actions" if she were found outside of her designated areas. McAndrew's job title and compensation remained unaffected.

Mercy Health submitted evidence that on October 23, 1998, it decided to switch to powder-free latex gloves. Mercy Health also submitted evidence that the switch to powder-free gloves was implemented by late December, 1998. McAndrew submitted evidence that she was never told about the switch. McAndrew's job restrictions remained unchanged. February 15, 1999, McAndrew submitted a letter of resignation, effective February 28, 1999. In the letter, McAndrew cited the hospital's restrictions as isolating and limiting her professional growth to the point that she was forced to resign.

February 20, 2001, McAndrew filed suit against Mercy Health alleging discrimination and retaliation under the Americans with Disabilities Act (hereinafter ADA) and the Pennsylvania Human Relations Act (hereinafter PHRA), as well as retaliation for McAndrew submitting her Workers' Compensation claim. Mercy Health filed the present Motion for Summary Judgment (Doc. 53) on July 15, 2003. The motion has been fully briefed, and a hearing was held on November 14. This matter is now ripe.

LEGAL STANDARD

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment

as a matter of law." FED. R. CIV. P. 56(c). A fact is material if proof of its existence or non-existence might affect the outcome of the suit under the applicable substantive law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Where there is no material fact in dispute, the moving party need only establish that it is entitled to judgment as a matter of law. Where, however, there is a disputed issue of material fact, summary judgment is appropriate only if the factual dispute is not a genuine one. *See id.* at 248. An issue of material fact is genuine if "a reasonable jury could return a verdict for the nonmoving party." *Id*.

Where there is a material fact in dispute, the moving party has the initial burden of proving that: (1) there is no genuine issue of material fact; and (2) she is entitled to judgment as a matter of law. *See* 2D CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2727 (2d ed. 1983). The moving party may present its own evidence or, where the nonmoving party has the burden of proof, simply point out to the court that "the nonmoving party has failed to make a sufficient showing of an essential element of her case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party, and the entire record must be examined in the light most favorable to the nonmoving party. *See White v. Westinghouse Elec. Co.*, 862 F.2d 56, 59 (3d Cir. 1988).

Once the moving party has satisfied its initial burden, the burden shifts to the nonmoving party to either present affirmative evidence supporting its version of the material facts or to refute the moving party's contention that the facts entitle it to judgment as a matter

of law. *See Anderson*, 477 U.S. at 256-257. The court need not accept mere conclusory allegations or denials taken from the pleadings. *See Schoch v. First Fidelity Bancorporation*, 912 F.2d 654, 657 (3d Cir. 1990). In deciding a motion for summary judgment, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

DISCUSSION

As a preliminary matter, the Court has jurisdiction over this case pursuant to federal question jurisdiction, 28 U.S.C § 1331, for the claims of discrimination and retaliation under the ADA, 42 U.S.C § 12117 and 42 U.S.C § 12203, respectively, and supplemental jurisdiction pursuant to 28 U.S.C. § 1367 for the state law claims.

Mercy Health moves for summary judgment on four separate grounds. First, Mercy Health argues that McAndrew has failed to prove she is a disabled person under the ADA. Second, Mercy Health argues that McAndrew has failed to prove she was a qualified individual under the ADA. Third, Mercy Health argues that McAndrew has failed to prove she was discriminated against. Fourth, Mercy Health argues that McAndrew has failed to prove Mercy Health retaliated against her requests for accommodations. Mercy Health also argues that since the federal issues should be adjudicated in its favor, the Court should decline to resolve the outstanding Workers' Compensation retaliation claim. I will address each of these issues in turn.

In order to state a prima facie case of disability discrimination under the ADA, a

plaintiff must show that: (1) she is disabled within the meaning of the ADA; (2) she is otherwise qualified to perform the essential functions of the job, with or without a reasonable accommodation by the employer; and (3) she has suffered an adverse employment decision as a result of disability discrimination. *Gaul v. Lucent Techs., Inc.*, 134 F.3d 576, 580 (3d Cir.1998); *see also Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 142 (3d Cir.1998) (en banc) (citing *Gaul*). After the plaintiff has established a prima facie case of disability discrimination, the burden shifts to the defendant to state a legitimate, non-discriminatory reason for the employment action. *Shaner v.* Synthes, 204 F.3d 494, 500 (3d Cir. 2000). If the defendant satisfies this burden, the plaintiff must prove, by a preponderance of the evidence, that the legitimate reasons offered by the defendant are a pretext for discrimination. *Id.* While the burden of production shifts back and forth between the parties, the ultimate burden of persuasion remains with the plaintiff. *Id.* at 500-01.

State PHRA claims are subject to the same analysis as ADA claims. *See Taylor v. Phoenixville Sch. Dist.,* 184 F.3d 296, 306 (3d Cir. 1999); *see also Rinehimer v. Cemcolift, Inc.*, 292 F.3d 375, 382 (3d Cir. 2002). Thus, while the Court will discuss McAndrew's disability and retaliation claims under the framework of the ADA, the resulting analysis applies both to McAndrew's ADA claims and to her PHRA claims.

1) "Disabled" Under the ADA

The first element McAndrew must prove in her prima facie case is that she was disabled. Under the ADA, "disability" means: (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of

having such an impairment; or (3) being regarded as having such an impairment. 42 U.S.C. § 12102(2). In the present case, McAndrew alleges that she is disabled because she has a latex allergy which limits several major life activities, and because Mercy Health believed that her latex allergy was a disability. Thus, McAndrew alleges that she is disabled under prongs one and three of the definition.

A) Physical Impairment

McAndrew first asserts that she was disabled because her latex allergy is a physical impairment that substantially limits several major life activities. Rather than relying on a medical diagnosis, a plaintiff must show that her impairment "prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." *Toyota Motor Mfg., Ky., Inc., v. Williams*, 534 U.S. 184, 198 (2002). These 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). This list is not exclusive. *See Toyota Motor Mfg.* at 197. The plaintiff must show that she is either completely unable to perform a major life activity or significantly restricted in conditions, manner, or duration of performing a life activity. 29 C.F.R. § 1630.2(j) (*see also Toyota Motor Mfg.*, 534 U.S. at 198).

> (2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:
> (i) The nature and severity of the impairment;
> (ii) The duration or expected duration of the impairment; and
> (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

Id. When evaluating whether a person suffers from a disability, the Court should evaluate the

individual's condition when corrective measures are being used. *Sutton v. United Airlines Inc.*, 529 U.S. 471, 482 (1999). Both the positive and negative effects of these measures should be considered. *Id.*

In the present case, McAndrew contends that when she suffers an attack, she is impaired in the major life activities of breathing, seeing, speaking, smelling, and concentrating. McAndrew also states that she is substantially limited from the major life activities of brushing her teeth, cooking, and performing household chores because sometimes she cannot do these things when she is suffering from an attack. It is not clear to the Court that brushing one's teeth or cooking could by themselves constitute major life activities, but I need not reach this issue for the present motion.

McAndrew also alleges that she is substantially limited in the major life activities of socializing and working in a non latex-safe environment. Mercy Health contends that McAndrew is not limited in any life activities when she is not suffering from an allergy attack, and it contends that McAndrew's avoidance mechanisms do not qualify her as disabled. McAndrew cites *Scanlon v. Temple*, No. 01-243, 2001 U.S. Dist. LEXIS 25044 (E.D. Pa. Nov. 28, 2001), in support of her argument that she is substantially limited, despite her infrequent allergy attacks. In *Scanlon*, the plaintiff argued that the court should ignore the corrective measure of avoidance when determining whether the plaintiff's latex allergy substantially limits life activities. However, McAndrew contends that the corrective measure of avoidance *causes* limitations on major life activities. In accordance with *Sutton*, the Court must evaluate McAndrew's condition taking into account the corrective measures she

employs, which include her avoidance of environments with latex.

I find that there is no material issue of fact about whether McAndrew was substantially limited in the major life activities of breathing, seeing, speaking, smelling, concentrating, brushing her teeth, cooking, and performing household chores. McAndrew submitted evidence that before she was moved to the Wilkes-Barre office, she was using her inhaler two to three times a day to control her breathing. While this evidence could suggest a substantial limitation, the conditions at that time did not include McAndrew's corrective measure of avoidance. McAndrew testified that from January, 2002, through July, 2002, she avoided latex, and she suffered less than ten attacks, each of which lasted less than two hours. This does not constitute a permanent and long-term impairment required for a disability.

In regards to the socialization, there is some question whether interacting with others constitutes a major life activity. While the Court of Appeals for the Third Circuit has not directly spoken on the issue, several district courts have held that social interaction is a major life activity. *See Sherback v. Wright Auto. Group*, 987 F. Supp. 433, 438 (W.D. Pa. 1997); *see also Garvey v. Jefferson Smurfit Corp.*, 2000 WL 1586077 at *3 (E.D. Pa. Oct. 24, 2000). I agree that the ability to socialize and interact with others is a major life activity.

McAndrew submitted evidence that her allergy requires to her avoid places where there is latex. She also submitted evidence that before she can go somewhere new, she must call ahead to check whether there is latex at the location. If latex is present, she must either arrange special accommodations, or she cannot go to the location. Her allergy has prevented her from going to restaurants, church, and even her son's school. Viewing the

evidence in the light most favorable to the nonmoving party, I find that there is a material issue of fact about whether McAndrew is substantially limited in her ability to socialize.

To be substantially limited in the major life activity of working, McAndrew must be unable to perform a class of jobs, or a broad range of jobs in many classes, and not simply unable to perform one particular job. *Marinelli v. City of Erie*, 216 F.3d 354, 364 (3d Cir. 2000). The determination of whether an individual has a disability must be made at the time of the adverse employment decision. *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 308 (3d Cir. 1999). In the present case, McAndrew argues that she was substantially limited from working in the medical field at the time Mercy Health instituted the unnecessary restrictions on her work environment because of the prevalence of powdered latex gloves in the medical field. However, McAndrew has failed to provide any evidence of the prevalence of powdered latex gloves in the medical community. Without such evidence, a reasonable jury cannot conclude that McAndrew was substantially limited in the major life activity of working. I find that there is no material issue of fact about whether McAndrew was substantially limited in the major life activity of working.

B) Regarded as Having a Disability

McAndrew next asserts that she is disabled because Mercy Health regarded her as having a disability.

> A plaintiff is regarded as having a disability if the person:
>
> (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
>
> (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

> (3) Has [no such impairment] but is treated by a covered entity as having a substantially limiting impairment.

Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 187 (3d Cir. 1999) (brackets in original). A plaintiff may make out a case for perceived disability where the employer innocently misinterpreted information about an employee's workplace limitations. *See Pathmark,* 177 F.3d at 190-91. The Third Circuit has held that:

> An employer can rely on an employee's information about restrictions, but it has to be right when it decides that these restrictions are permanent and that they prevent the employee from performing a wide class of jobs, as opposed to one particular and limited job. An employer who simply, and erroneously, believes that a person is incapable of performing a particular job will not be liable under the ADA. *Liability attaches only to a mistake that causes the employer to perceive the employee as disabled within the meaning of the ADA,* i.e., *a mistake that leads the employer to think that the employee is substantially limited in a major life activity.*

Id. at 191-92 (emphasis added); *see also Rinehimer v. Cemcolift, Inc.*, 292 F.3d 375, 381 (3d Cir. 2002) (citing *Pathmark*).[1]

McAndrew has submitted evidence that Mercy Health prohibited her from moving freely in the Wilkes-Barre medical office building and traveling to any locations in the community or any professional conferences. McAndrew also submitted evidence that once she was transferred to the Montage facility, Mercy Health prohibited her from meeting with

[1] Mercy Health cites *Rinehimer* for the proposition that the "regarded as" test requires that "the perceived impairment substantially limited her ability to perform one or more major life activities." (Defendant's Reply Br. Summ. J., Doc. 66 at 6.) However, Mercy Health misinterprets *Rinehimer*. No such requirement exists for perceived disabilities. The stated requirement only exists when the employee is trying to prove she was discriminated against because of an *actual* impairment. *See Rinehimer*, 292 F.3d at 831.

any patients. McAndrew submitted evidence that Mercy Health created these restrictions on the belief that McAndrew could not do these activities safely because of her latex allergy. Viewing the evidence in the light most favorable to the nonmoving party, there is a material issue of fact as to whether Mercy Health believed that McAndrew was substantially limited in a major life activity.

2) Qualified Individual

The second element McAndrew must prove for her prima facie case is that she was a qualified individual. "The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). As part of being qualified, an employer can require that a person not be a threat to himself or others. *See* 42 U.S.C. § 12113; *see also Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 74 (2002).

In the present case, Mercy Health does not challenge that McAndrew satisfied the requirements for the position. They argue that McAndrew was not qualified because her allergy made her a threat to herself. McAndrew has presented evidence that in a powder-free latex glove hospital, she is capable of performing her duties without incident. Therefore, there is a material issue of fact as to whether McAndrew was a qualified individual.

3) Discrimination

The third element McAndrew must prove for her prima facie case is that she was discriminated against. Discrimination under the ADA comes in two forms: (1) subjecting the employee to an adverse employment action motivated by prejudice or fear; or (2) failing

to provide a reasonable accommodation for a disability. *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 306 (3d Cir. 1999). In the present case, McAndrew has alleged both types of discrimination, but the issue is complicated by the fact that she claims that the accommodation provided by Mercy Health was an adverse employment action.

A) Adverse Employment Action

The ADA requires that an employer provide reasonable accommodations to the employee when requested, unless the requested accommodation would create an undue hardship for the employer. 42 U.S.C. § 12112(b)(5)(A). Reasonable accommodations include "[m]odifications 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)(1)(ii).

An adverse employment action is one in which a reasonable person could find that the employment was substantially worsened. *DiIenno v. Goodwill Indus. of Mid-Eastern Pa*, 162 F.3d 235, 236 (3d Cir. 1998). "The facts that her pay and benefits were not reduced and that [the employer] considered the jobs equivalent are not dispositive [as to whether an employment action is adverse]." *Id.* A transfer to a dead-end job can constitute an adverse employment action. *Torre v. Casio, Inc.*, 42 F.3d 825, 831 (3d Cir. 1994). Constructive discharge can constitute an adverse employment action. *See Suders v. Easton*, 325 F.3d 432, 447 (3d Cir. 2003). A person is constructively discharged when an employer "permitted conditions so unpleasant or difficult that a reasonable person would have felt

compelled to resign." *Duffy v. Paper Magic Group, Inc.*, 265 F.3d 163, 167 (3d Cir. 2001) (citing *Spangle v. Valley Forge Sewer Auth.*, 839 F.3d 171, 173 (3d Cir. 1988)). An alteration in job responsibilities can rise to the level of constructive discharge. *Clowes v. Allegheny Valley Hosp.*, 991 F.2d 1159, 1161 (3d Cir. 1993) (citing *Gray v. York Newspapers, Inc.*, 957 F.2d 1070, 1082 (3d Cir.1992) and *Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 888-89 (3d Cir.1984)).

Mercy Health raises two similar but distinct arguments in its defense. First, Mercy Health contends that it did not subject McAndrew to an adverse employment action because her salary and benefits were not reduced, she was not demoted, and Mercy Health never expressed any dissatisfaction with her job performance. This argument ignores the evidence that McAndrew suffered significant changes in her job responsibilities which rose to the level of constructive discharge. Additionally, the changes in her job could effectively constitute a job transfer, which, in turn, could also constitute an adverse employment action. The finding of an adverse employment action is not precluded by the lack of a change in McAndrew's title or a reduction in her pay. McAndrew has submitted evidence that Mercy Health stripped her of her ability to perform her job, including her supervisory responsibilities and patient interactions, to the point that a reasonable person could find that the employment was substantially worsened and/or intolerable. There is a material issue of fact whether the job changes experienced by McAndrew constitute an adverse employment action.

Second, Mercy Health argues that it did not engage in any discriminatory conduct because its decisions, whether erroneous or not, were made without animus; therefore,

Mercy Health was not acting in a discriminatory manner. Mercy Health offered no authority which supports this argument.[2] When an employee is claiming discrimination for failure to accommodate, the employer can defend by proving good faith participation in the interactive process. *Mengine* v. Runyon, 114 F.3d 415, 420 (3d Cir. 1997). However, the inquiry does not end there. When an employer purports to provide an accommodation, which Mercy Health did here, the issue becomes whether or not the accommodation was a reasonable one.

The particular problem in this case is that it is arguable that the accommodation made by the employer is at the same time an adverse employment action. To permit an employer to adversely affect an employee simply because he was trying to accommodate the employee's disability would negate the primary purpose of the ADA, which is "to diminish or to eliminate the stereotypical thought processes, the thoughtless actions, and the hostile reactions that far too often bar those with disabilities from participating fully in the Nation's life, including the workplace." *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401 (2002). The ADA only permits an employer to provide "reasonable accommodations."

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[2] Mercy Health did offer several cases which it contends stand for the proposition that an employer is free to accommodate an employee as it sees fit. However, those cases are distinguishable from the present case. In *Guice-Mills v. Derwinski*, the employee was not qualified for the position. 967 F.2d 794, 798 (2d Cir. 1992) (Rehabilitation Act). In *Vande Zande v. Wis. Dept. of Admin.*, the Court's ruling was focused on the holding that working from home was not a reasonable accommodation. 44 F.3d 538, 544-45 (7th Cir. 1995). These cases are also inconsistent with the position of the Court of Appeals for the Third Circuit that the employer and employee must engage in an interactive process when determining an appropriate accommodation. If an employer is free to ignore the employee's requests, then there is no interactive process. *See, e.g.*, *Mengine v. Runyon*, 114 F.3d at 420 (quoting *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996)).

Therefore, when an employee is challenging the accommodation as an adverse employment action, the jury must determine whether the employer acted reasonably in providing the accommodation, taking into account the alternative accommodations available to the employer.

Applying this standard to the facts of the present case, there is a material issue of fact whether Mercy Health discriminated against McAndrew. First, as discussed above, a reasonable jury could find that Mercy Health subjected McAndrew to an adverse employment action. Mercy Health argues that there was no alternative reasonable accommodation because McAndrew presented a threat to herself in an uncontrolled environment. McAndrew has submitted evidence that she has worked in a powder-free latex glove hospital environment for two years without incident.[3] She has also submitted evidence that Mercy Health switched to powder-free gloves in December, 1998, which indicates that the alternative accommodation would not have created an undue burden upon Mercy Health. Finally, it is undisputed that McAndrew requested the alternative accommodation, and she presented a great deal of information about her allergy and methods to accommodate it. There are material issues of fact whether switching to powder-free gloves was an alternate reasonable accommodation.

B) Failure to Accommodate

McAndrew also alleges that Mercy Health engaged in discrimination by failing to accommodate McAndrew when it did not engage in the interactive process. The ADA

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[3] The Court notes that she did experience a single attack caused by latex balloons on the premises for a party.

requires that an employer provide reasonable accommodations to the employee when requested, unless the requested accommodation would create an undue hardship for the employer. 42 U.S.C. § 12112(b)(5)(A).

> To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

29 C.F.R. § 1630.2(o)(3). *See Mengine v. Runyon*, 114 F.3d 415, 420 (3d Cir. 1997) (both employer and employee has duty to participate in interactive process); *see also Conneen v. MBNA Am. Bank, N.A.*, 334 F.3d 318, 330 n.13 (3d. Cir. 2003) (applying *Mengine* to ADA case).

McAndrew submitted evidence that Mercy Health ignored McAndrew's requests for the accommodation of powder-free latex gloves. She submitted evidence that none of the Mercy Health representatives at the meetings were familiar with disability accommodations. McAndrew also submitted evidence that she was threatened with disciplinary action if she ignored the accommodation restrictions. Lastly, she submitted evidence that Mercy Health refused to consider an accommodation other than the restrictions placed upon McAndrew. There are material issues of fact about whether Mercy Health engaged in good faith in the interactive process to accommodate McAndrew.

4) Retaliation

McAndrew alleges that Mercy Health also violated the ADA by retaliating against her when she requested reasonable accommodations in December, 1997, and again in April,

1998. The ADA prohibits an employer from retaliating against an employee who engages in a protected activity. 42 U.S.C. § 12203(a). Requesting reasonable accommodations is an activity protected by the ADA. *See* 42 U.S.C. § 12111(b)(5)(A) (requiring employer to provide reasonable accommodations when requested). In order to succeed on this claim, she must prove that: (1) she engaged in conduct protected by the ADA; (2) she was subjected to an adverse employment action at the time, or after, the protected conduct took place; and (3) there was a causal connection between the protected activity and the adverse employment action. *Krouse v. Am. Sterilizer Co.*, 126 F.3d 494, 500 (3d Cir. 1997).

McAndrew submitted evidence of all of the following: McAndrew requested an accommodation in December of 1997. Two months later, Mercy Health staff met with McAndrew to discuss possible accommodations. Four months later, Mercy Health transferred McAndrew to Wilkes-Barre and warned her that she would be subject to disciplinary action if she went outside of her designated latex-free area. Mercy Health admits that it did not post "latex free area" signs in the Wilkes-Barre office until several months after McAndrew arrived there. McAndrew sent several letters to Mercy Health officials requesting different accommodations and objecting to how she was being treated. The responses sent by Mercy Health stated that Mercy Health had the final say on the appropriateness of accommodations. Less than three months after McAndrew's complaints, McAndrew was transferred to Montage.

All of these actions could be interpreted as inconsistent with the interactive process of accommodating an employee. Less than six months elapsed between requests by McAndrew and responses by Mercy Health. This could lead a reasonable jury to conclude a

causal connection existed between the protected activities and the alleged retaliatory actions. Further, as I already discussed above, the actions of Mercy Health may constitute an adverse employment action.[4] There is a material issue of fact whether Mercy Health retaliated against McAndrew in violation of the ADA.

5) Pennsylvania Workers' Compensation retaliation claim

Mercy Health also requested that the Court decline to exercise supplemental jurisdiction over the remaining retaliation claim regarding McAndrew's Worker's Compensation action. Since I will deny Mercy Health's request for summary judgment on the ADA and PHRA claims, I will also retain jurisdiction over the final claim.

CONCLUSION

Mercy Health's Motion for Summary Judgment will be denied because there are material issues of fact as to whether McAndrew was disabled, whether she was qualified, and whether Mercy Health discriminated and/or retaliated against her in violation of the Americans with Disabilities Act and/or the Pennsylvania Human Relations Act.

An appropriate order follows.

December 3, 2003
Date

A. Richard Caputo
United States District Judge

[4] The Court notes that, unlike the discrimination analysis, whether Mercy Health acted with animus is relevant for determining whether an employment action was retaliatory, because it goes directly to Mercy Health's motivation.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MARIANNE G. McANDREW,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION NO. 3:CV-01-0317
v.	:	
	:	
MERCY HEALTH PARTNERS,	:	(JUDGE CAPUTO)
	:	
Defendant.	:	

ORDER

NOW, this _3rd__ day of December, 2003, **IT IS HEREBY ORDERED** that Defendant's Motion for Summary Judgment (Doc. 53) is hereby **DENIED**.

_____
A. Richard Caputo
United States District Judge

FILED 12/03/03