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

JOHN S. NAVE	:	CIVIL ACTION
v.	:	
WOOLDRIDGE CONSTRUCTION OF PENNSYLVANIA, INC.	:	NO. 96-2891

Rendell, J.

June 30, 1997

MEMORANDUM

Plaintiff John Nave brought this action against Wooldridge Construction of Pennsylvania, Inc., ("Wooldridge"), alleging employment discrimination in violation of Title I of The Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. § 12101, et seq., The Family Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. § 2601, et seq., and The Pennsylvania Human Relations Act ("PHRA"). Plaintiff has also brought a claim for breach of contract. Defendant has moved for summary judgment on all counts and plaintiff has moved for partial summary judgment on the issue of whether plaintiff is a qualified individual with a disability under the ADA. Having considered the briefs the parties have submitted, for the reasons set forth below I will deny plaintiff's motion for partial summary judgment and grant defendant's motion for summary judgment as to Counts I, III, and IV.

I. Summary Judgment 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). An issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). A factual dispute is "material" only if it might affect the outcome of the suit under governing law, id. at 248, and all inferences must be drawn, and all doubts resolved, in favor of the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Gans v. Mundy, 762 F.2d 338, 341 (3d Cir.), cert. denied, 474 U.S. 1010, 106 S. Ct. 537 (1985).

On a motion for summary judgment, the moving party bears the initial burden of identifying for the Court those portions of the record that it believes demonstrate the absence of dispute as to any material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). To defeat summary judgment, the non-moving party "may not rest upon the mere allegations or denials of [its] pleading, but [its] response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The non-moving party must demonstrate the existence of evidence that would support a jury finding in its favor. See Anderson, 477 U.S. at 248-49.

Where the non-moving party bears the burden of proof at trial, summary judgment is appropriate if the non-movant fails to make a showing sufficient to establish the existence of an element essential to its case. "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is entitled to a judgment as a matter of law because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." Celotex, 477 U.S. at 322-23.

II. Factual Background

Plaintiff was employed by defendant from February 23, 1994 to January 12, 1995 in its landscape department to perform integrated pest management, various landscaping services and supervision of a grass mowing crew. On March 19, 1994, plaintiff was diagnosed with Hodgkin's disease. On April 26, 1994, plaintiff underwent a staging laparotomy, splenectomy and liver biopsy and it was confirmed by plaintiff's physician, Dr. Glick, that plaintiff had pathologic Stage IIA Hodgkin's disease. Plaintiff was discharged from the hospital on May 3, 1996, and he

recuperated at home. Plaintiff was then treated at the Cancer Center of the Hospital of the University of Pennsylvania where he received mantle radiation therapy from May 19 to June 21, 1994, and para-aortic radiation from July 11 to August 13, 1994. On June 27, 1994 plaintiff was seen for anxiety, restlessness, panic attacks, dyspepsia and fatigue. He was referred to a psychiatrist and then to a psychologist. On August 18, 1994, plaintiff was diagnosed with major depression without suicidal ideation, and extreme fatigue secondary to both radiation and major depression. Plaintiff did not work during the period that he had his surgery and treatment.[1]

On September 15, 1994, plaintiff returned to work. At this time, plaintiff had no evidence of recurrent Hodgkin's disease and had an improvement in his reactive depression and anxiety.[2] Plaintiff made arrangements with his employer to limit his hours in a given day, depending on how he felt, rather than to take a set number of days off. From September 22, 1994 through December 21, 1994 plaintiff worked from 18 to 40 hours

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1. Review of plaintiff's time records indicates that plaintiff worked no hours at Wooldridge from April 21, 1994 until September 15, 1994.

2. Plaintiff was seen by Dr. Glick at the University of Pennsylvania Cancer Center on September 15, 1994. "His symptoms of depression and anxiety improved with psychological counseling, but he was still fatigued and had a sense of malaise. We recommended that he work part-time and did not feel that he was capable of resuming his normal physically demanding job. At that time, we felt that he had no evidence of recurrent Hodgkin's disease, and had an improvement in his reactive depression and anxiety." Dr. Glick's October 4, 1996, letter to Richard Reed at 3.

per week. On December 21, 1994 plaintiff experienced a seizure or fainting episode while at work. Plaintiff was under the care of his physician, and was advised in late December that he could return to work. At this time plaintiff's Hodgkin's disease was in complete remission although he was still fatigued from the radiotherapy.[3] Plaintiff notified his employer that he could return to work and was informed of his termination. Plaintiff was terminated from his job at Wooldridge Construction Company on January 12, 1995. Plaintiff is currently employed at Hechinger's in a horticulture position that involves taking care of plants, training people that work directly under him, and being a salesperson.

III. Discussion

A. Count I: Violation of ADA

Plaintiff alleges he was terminated from his position as a grass cutting foreman in the landscaping department at Wooldridge because of his diagnosis and treatment for Hodgkin's disease. Plaintiff contends that this disease constitutes a "disability" entitling him to the protections of the ADA and the PHRA. Specifically, plaintiff claims that he clearly meets the ADA's statutory definition of a "disability" in that while he was employed by defendant, plaintiff had physical as well as mental impairments that substantially limited one or more of his major

3. "It was our impression on 12/21/94 that his Hodgkin's disease was in complete remission although he was still fatigued from the radiotherapy." Dr. Glick's October 4, 1996 letter to Richard Reed at 3.

life activities. Defendant does not dispute that plaintiff was diagnosed and suffered from Hodgkin's disease, but argues that plaintiff has not met his burden of establishing that this illness substantially limited his performance of major life activities so as to constitute a "disability" under the ADA.

The ADA prohibits discrimination "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). In order to sustain a claim under the ADA, a plaintiff must establish[4]:

> (1) that he is a disabled person within the meaning of the ADA; (2) that he is qualified, that is, with or without reasonable accommodation (which he must describe), he is able to perform the essential functions of the job; and (3) that the employer terminated him because of his disability.

Milton v. Scrivner, Inc., 53 F.3d 1118, 1123 (10th Cir. 1995). Plaintiff has the burden of proof at trial as to these elements. As such, in order to defeat defendant's motion for summary judgment, plaintiff must make a showing sufficient to establish the existence of these essential elements of its case. The first element requires an examination of whether plaintiff is disabled.

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4. The PHRA is analyzed in the same manner as ADA claims. Doe v. Kohn, Nast & Graf, P.C., 862 F. Supp. 1310, 1323 (E.D. Pa. 1994). For that reason, while the following discussion expressly addresses only plaintiff's ADA claim, it also resolves his PHRA claim.

1. Is Plaintiff "Disabled"?

Defendant attacks plaintiff's claim by arguing that his condition, Hodgkin's Disease, as it has affected plaintiff, is not a disability under the ADA. A disability is defined under the ADA as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). In this case, plaintiff bases his claim of disability upon the first and third prongs of the definition.[5]

a. Substantial Limitation of Major Life Activity

With respect to the first prong, it is undisputed that plaintiff was diagnosed and suffered from Hodgkin's disease. Defendant's memorandum of law in opposition to plaintiff's motion for partial summary judgment at 1. Hodgkin's disease is a cancer of the lymphatic system and as such is a physical impairment as that term is defined under the ADA.[6] A physical impairment

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5. Although defendant argues in his motion for summary judgment that plaintiff has not shown a record of an impairment, I need not address this aspect of the definition of disability as plaintiff asserts no claim in his pleading, motion or responses that he has a record of such an impairment.

6. A physical or mental impairment is defined as: (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. 29 C.F.R. § (continued...)

alone, however, is not necessarily a disability as contemplated by the ADA because not every impairment substantially limits a life activity. See Penchishen v. Stroh Brewery Co., 932 F. Supp. 671, 674 (E.D. Pa. 1996), aff'd, No. 96-1807 (3d Cir. May 9, 1997).

In order to be considered a "disability" the impairment must "substantially limit" one or more of plaintiff's "major life activities." 42 U.S.C. § 12102(2)(A). "Major life activities," though not defined by statute, are defined by regulation[7] as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[8] 29 C.F.R. § 1630.2(i). See Roth v. Lutheran General Hosp., 57 F.3d 1446, 1454 (7th Cir. 1995).

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6. (...continued)
1630.2(h)(1),(2) (1996) (emphasis added). Moreover, the legislative history of the ADA indicates that Congress considered cancer to be an impairment. See S.Rep. No. 116, at 22 (1989).

7. The Equal Employment Opportunity Commission, ("EEOC"), is the agency charged with administering Title I of the Americans with Disabilities Act, the subchapter proscribing employment discrimination. While the ADA defines neither "substantial limits" nor "major life activities," the regulations promulgated by the EEOC under the ADA provide significant guidance. See 42 U.S.C. § 12116 (requiring the EEOC to issue regulations to implement Title I of the ADA).

8. This listing was not intended to be exhaustive and other major life activities could include lifting, reaching, sitting, or standing. 29 C.F.R. pt. 1630 App. § 1630.2(1).

Plaintiff has confined his arguments to the major life activities of caring for himself, performing manual tasks, working, and standing.[9]

Plaintiff also claims that "[o]ther major life activities compromised included mental and emotional processes, such as thinking, concentrating and interacting with others". See Plaintiff's response to defendant's motion for summary judgment at 13. I will limit my analysis of his disability claim accordingly.

A "substantially limiting impairment" is one which is a "significant" restriction on a major life activity. Schluter v. Indus. Coils, Inc., 928 F. Supp. 1437, 1444 (W.D. Wis. 1996). The regulations provide that a substantial limitation exists if plaintiff is "unable to perform a major life activity that the average person in the general population can perform . . . or . . . significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to" the average person. 29 C.F.R. § 1630.2(j)(1).

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9. Plaintiff notes in his motion for partial summary judgment that he has also been substantially limited in his ability to "take care of routine activities of daily living." Plaintiff's motion for partial summary judgment at 1-2. I will consider this activity in conjunction with my analysis of the activity of caring for one's self.

I first examine whether plaintiff's impairment substantially limits a major life activity other than working.[10] Despite assertions to the contrary, plaintiff has presented no evidence that he is substantially limited in his ability to care for himself, perform manual tasks, or stand. Although plaintiff's medical expert testified that plaintiff should reduce his hours and be assigned lighter duties, Dr. Glick offers no opinion suggesting that plaintiff is in any way impaired, let alone substantially impaired, in his ability to care for himself, perform manual tasks, or stand. In addition, although plaintiff testifies that his physical activities have been limited by the disease in that he is only physically able to perform certain jobs until he becomes fatigued, he has presented no evidence of difficulties in other activities besides working. See Plaintiff's Dep. at 26-27 (noting that he could handle spraying responsibilities until he became fatigued, which was usually about three to four hours). As such, I find that no reasonable jury could conclude that plaintiff is substantially limited in his ability to care for himself, perform manual tasks or stand.

Plaintiff also claims that his mental and emotional processes, such as thinking, concentrating and interacting with others have been substantially limited. On August 18, 1994, plaintiff was diagnosed with major depression without suicidal

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10. "If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working." 29 C.F.R. pt. 1630 App. § 1630.2(j).

ideation, and extreme fatigue secondary both to radiation and major depression. Dr. Glick's October 4, 1996 letter to Richard Reed at 2-3. Plaintiff was prescribed antidepressant medication, counseling was arranged, and on September 15, 1994, it was noted that plaintiff had an improvement in his reactive depression and anxiety. Id. at 3. Plaintiff's physicians noted that plaintiff "benefited remarkably from psychotherapy [and his] symptoms of depression and anxiety are much improved." Doctors Schneider and Glick's September 15, 1994 report at 1. Any impairment of plaintiff's mental or emotional processes, therefore, was of a temporary nature and as such does not qualify as a disability. See Blanton v. Winston Printing Co., 868 F. Supp. 804 (M.D.N.C. 1994) (holding that while plaintiff may have been disabled at times, impairments of short duration do not qualify as disabilities). "[T]emporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities." 29 C.F.R pt. 1630 App. § 1630.2(j).[11] See Sanders v. Arneson Products, Inc., 91 F.3d 1351, 1353-54 (9th Cir. 1996), cert. denied, 117 S. Ct. 1247 (1997) (holding that a psychological disorder triggered by cancer, lasting less than four months, and having no residual effects was not a

11. Under the EEOC's interpretations, the following factors should be considered in determining whether an individual is substantially limited in a major life activity: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment. 29 C.F.R. § 1630.2(j)(2).

"disability" under the ADA). Moreover, plaintiff's own medical expert, Dr. Glick, does not state that plaintiff has any mental problem that substantially limits his thought processes or thinking activities. As such, I am persuaded that a jury could not find that plaintiff's impairment substantially limited his mental or emotional processes.

Having found the evidence insufficient to support a finding that plaintiff is substantially limited with respect to the major life activities of caring for himself, performing manual tasks, or standing, or as to his mental or emotional processes, I now consider plaintiff's ability to perform the major life activity of working. See 29 C.F.R. pt. 1630 App. § 1630.2(j) ("If an individual is not substantially limited with respect to any other major life activity, the individual's ability to perform the major life activity of working should be considered.").

With regard to the activity of working:

> [S]ubstantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3)(i).

The appendix to the regulations offers interpretive guidance. It states that " an individual is not substantially limited in working just because he or she is unable to perform a

particular job for one employer, or because he or she is unable to perform a specialized job or profession requiring extraordinary skill, prowess or talent." 29 C.F.R. pt. 1630 App. § 1630.2(j).

Three additional factors can be considered when determining whether an impairment substantially limits the major life activity of working because a class of jobs or broad range of jobs are foreclosed to an individual:

> (1) The geographical area to which the individual has reasonable access; (2) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or (3) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

29 C.F.R. § 1630.2(j)(3)(ii)(A)-(C); see Horth v. General Dynamics Land Systems, Inc., 1997 WL 145052, at *4 (M.D. Pa. March 26, 1997) ("In particular, a court should consider the plaintiff's ability, talents, and skills as marketable within the plaintiff's geographic community to determine whether he is unable to perform a class of jobs.").

Plaintiff asserts that his impairment substantially limits him in the major life activity of working, but he has not shown that his impairment significantly restricts his ability to perform either a class of jobs or a broad range of jobs in

various classes as compared to the average person having comparable training, skills, and abilities. See 29 C.F.R. § 1630.2(j)(3)(i); see Bolton v. Scrivner, Inc., 36 F.3d 939, 944 (10th Cir. 1994), cert. denied, 115 S. Ct. 1104 (1995) (affirming award of summary judgment to employer because employee "failed to produce evidence showing a significant restriction in his ability to perform either a class of jobs or a broad range of jobs in various classes"). Instead, both plaintiff's deposition testimony and that of his physician demonstrate that plaintiff's limitations in no way eliminate an entire class of jobs which plaintiff can perform. There is no evidence that plaintiff could not do landscaping work in general, but rather, the evidence demonstrates that plaintiff could function by either working fewer hours or performing lighter duties.

Plaintiff's situation is similar to that of the plaintiff in Horth, 1997 WL 145052 at *5. In Horth, the record reflected that Horth had worked for General Dynamics at a job requiring some physical exertion but was capable of performing "light duty" at the time he was laid off. Id. at *7. A Workers' Compensation Judge determined that Horth was capable of performing "light duty" work and Horth himself admitted that he was able to perform "light duty" work. In addition, Horth's own physician opined that he could perform light duty work. Id. at *6.

The Horth court held that, "[g]iven Horth's established ability to continue work in his previous field, albeit on 'light

duty' status, along with his impressive educational background,[12] the record cannot support a finding that Horth's injuries have precluded him from employment in an entire class or a broad range of jobs." Id. at *7. The Horth court noted that "[a]lthough Horth's inability to lift heavy objects may eliminate certain specific jobs, such a restriction does not foreclose Horth's participation in an entire class of jobs or a broad range of jobs." Id. at *7.

Similarly, in the instant case, Dr. Glick opines that "Mr. Nave could have performed his duties as a landscape foreman at Wooldridge with reasonable accommodations, such as reduced work hours or being assigned lighter duty." Dr. Glick's October 4, 1996 letter at 4 (emphasis added). Dr. Glick notes that it "would be impossible for individuals such as Mr. Nave to work full time or to perform manual tasks requiring heavy physical activity." Id. (emphasis added). Dr. Glick does not, however, indicate that plaintiff could not work at all or that he was substantially limited in his ability to work. Plaintiff also does not testify that he could not work at all, but instead testifies that he could only work for so many hours before he

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12. The fact that Horth had several advanced degrees does not distinguish that case from the case at bar in that plaintiff testified that he also has an extensive educational background. Plaintiff testified that he graduated from high school, went to Temple University and Penn State and received an associates degree in entomology from Temple University. He has taken various continuing education courses in horticulture and is presently enrolled in emergency medical technician school to be a certified EMT. Plaintiff's Dep. at 5.

started to feel fatigued, which was usually about three to four hours. Plaintiff's Dep. at 26-27. Moreover, in his complaint, plaintiff alleges that he made numerous requests upon defendant for reasonable accommodations, including to be allowed to work on physically less demanding jobs such as the planting of trees and shrubs. Complaint at ¶ 23. As such, plaintiff himself admits that he is able to perform other types of jobs in horticulture besides the more strenuous jobs such as mulching and mowing. See Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 727 (5th Cir. 1995) (noting that the inability to perform one aspect of a job while retaining the ability to perform the work in general does not amount to substantial limitation of the activity of working).

In Wooten v. Farmland Foods, 58 F.3d 382 (8th Cir. 1995), plaintiff's physician recommended he be assigned lighter duty and submitted a doctor's note restricting his work activities to "light-duty -- no work with meat products -- no work in cold environment -- lifting 10 lbs. frequently 20 lbs. maximum." Id. at 384. The note gave no indication that Wooten's major life activities were substantially limited and the court found that such restrictions would not substantially limit Wooten's major life activities but rather only appeared to prevent Wooten from performing a narrow range of meatpacking jobs. Id. at 386. Similarly, Dr. Glick advised plaintiff to drink plenty of fluids and avoid heavy work, heavy lifting and heavy exercise but does not indicate that plaintiff's major life activities were substantially limited. Discharge summary from

the Hospital of the University of Pennsylvania; Dr. Glick's October 4, 1996 letter.

Plaintiff presents no evidence that a class of jobs for which he is qualified -- lighter jobs such as planting trees or shrubs -- are not available in his geographical area or that horticultural positions in his geographical area are only offered on a full-time basis.[13] The court must ask whether the particular impairment constitutes for the particular person a significant barrier to employment after considering such factors as the number and type of jobs from which the impaired individual is disqualified, the geographical area to which the individual has reasonable access, and the individual's job expectations and training. Schluter, 928 F. Supp. at 1447. It is plaintiff's burden to show that he is substantially limited in working as compared to someone with similar education, experience and background. Plaintiff has not presented any evidence detailing the class of jobs from which he is foreclosed, that is, the number and types of jobs utilizing similar training, knowledge, skills or abilities within his geographical area that he is

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13. In his complaint plaintiff admits that he is able to work at physically less demanding jobs. "Plaintiff made specific requests which included but were not limited to:
c) . . . to be allowed to work on physically less demanding jobs, which were available, such as but not limited to, the planting of trees and shrubs." Complaint at ¶ 23 (c) (emphasis added). In addition, after coming back to work from radiation therapy, plaintiff was assigned to the job of spraying pesticides, at which plaintiff would work until he became fatigued, "which was usually about three or four hours," at which point he was allowed to stop working and rest. Plaintiff's Dep. 27.

disqualified from holding because of his impairment. The plaintiff must make this minimum showing to create an issue of fact to prevent summary judgment. Ouzts v. USAir, Inc., 1996 WL 578514, at *13 (W.D. Pa. 1996), citing Marschand v. Norfolk and W. Ry. Co., 876 F. Supp. 1528, 1539 (N.D. Ind. 1995), aff'd 81 F.3d 714 (7th Cir. 1996); see Schluter, 928 F. Supp. at 1448 (finding that even if a lack of job-related demographic evidence is not fatal to a plaintiff's case on summary judgment, it is another indication of plaintiff's inability to raise a triable issue of disability); see also Horth, 1997 WL 145052 at *7 (finding that in the absence of evidence as to vocational history, educational background, the labor market for which plaintiff is suited, and the number and types of jobs from which plaintiff may be disqualified, plaintiff does not present a triable issue on whether he is significantly restricted in the major life activity of working).

Another factor which weighs against plaintiff's arguments is plaintiff's current employment status. See Byrne v. Board of Educ., Sch. of W. Allis-W. Milwaukee, 979 F.2d 560, 565 (7th Cir. 1992) (finding that a court may also examine whether a plaintiff can perform or has procured other employment); see also Ouzts, 1996 WL 578514 at *15 (finding that fact that employee continued to work as a real estate agent while on medical leave undermines any argument that plaintiff's impairment constitutes a significant barrier to employment in general). After being terminated from Wooldridge plaintiff worked for a period of one

month at a pet store stocking shelves. Plaintiff's Dep. at 8. Plaintiff does not contend that this position at the pet store was in any way difficult for him or that he was unable to perform the necessary duties because his training or skills did not translate to his new duties. In fact, plaintiff testified that he only left the pet store position after he was offered a position with higher pay at Hechinger's, a retail store. Id. at 8-9, 10. At Hechinger's plaintiff is in charge of the garden department, which includes the green house and the nursery, and he is responsible for taking care of approximately 2500 plants, training his subordinates, and being a salesperson. Plaintiff's Dep. at 9. Plaintiff makes no claims that he is limited in any way in his current job either in hours or types of work. Instead, plaintiff contends that the type of work he is doing currently is irrelevant, and that the only relevant time period is when he was employed by, and terminated by, defendant. However, his current employment and condition is relevant to show, at least, that whether or not he was impaired, it was not a permanent condition. Even assuming plaintiff was impaired until December 21, 1994 -- indicated by Dr. Glick as the date plaintiff's Hodgkin's disease was in complete remission -- the impairment was of a temporary nature since the disease was only active for a temporary period, and as such does not qualify as a disability. See Rakestraw v. Carpenter Co., 898 F. Supp. 386 (N.D. Miss. 1995) (concluding that a back injury which was completely cured by back surgery within one year and ten months

of the injury's occurrence was not a "disability" for purposes of the ADA).

Thus, I conclude that plaintiff has failed to provide sufficient evidence that his impairment substantially limited the major life activity of working. A reasonable jury could not conclude that plaintiff's impairment disqualifies him from either a class of jobs or a broad range of job opportunities, thereby limiting his employment generally.

b. Being regarded as having such an impairment

In the alternative, plaintiff bases his claim of disability on the third prong of the statutory definition, alleging that defendants "regarded" him as disabled. See 42 U.S.C. § 12102(2)(C).

Under this provision, a plaintiff would be entitled to the protection of the ADA even if he does not actually have a substantially limiting impairment, as long as he can show that defendants regarded him as having such an impairment. See 29 C.F.R. §1630.2(l). Where, as here, defendants concede that plaintiff has an impairment, plaintiff must still show that defendants perceived his impairment to be one which posed a substantial limitation on one of his major life activities. See, e.g., Forrisi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986). The mere fact that an employer is aware of an employee's impairment is insufficient to demonstrate either that the employer regarded the employee as disabled or that the perception caused the

adverse employment action. Kelly v. Drexel Univ., 94 F.3d 102, 109 (3d Cir. 1996).

In support of his argument that he was regarded by defendant as having an impairment that substantially limits his major life activity of working, plaintiff points to his deposition testimony.

> Q. Were there any other accommodations that you requested that were not granted?
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> A. The accommodations as far as only working until I got fatigued were eventually stopped.
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> Q. When did that occur?
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> A. Approximately two weeks after I came back from radiation therapy.
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> Q. And when was that?
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> A. In September sometime.
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> Q. So you're saying that the accommodation that you were allowed to work only as many hours as you could until you were fatigued only lasted two weeks?
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> A. That's correct.

Plaintiff's Dep. at 29.

Plaintiff argues that the fact that defendant offered some accommodation of reduced work hours is proof that they regarded plaintiff as being disabled. Plaintiff's memorandum of law in support of plaintiff's motion for partial summary judgment at 13. I disagree with plaintiff. An employer's decision to accommodate an employee or to place the employee on limited duty does not establish a "regarded as" claim under the ADA. Muller v. Automobile Club of S. Cal., 897 F. Supp. 1289, 1297 (S.D. Cal.

1995). A person is regarded as having an impairment that substantially limits the person's major life activities when other people treat that person as having a substantially limiting impairment. See 29 C.F.R. § 1630.2(1)(3). This provision is intended to combat the effect of archaic attitudes, erroneous perceptions, and myths that work to the disadvantage of persons with or regarded as having impairments. See School Bd. of Nassau County v. Arline, 480 U.S. 273, 279 (1987). Wooldridge's perception of plaintiff was not based upon speculation, stereotype or myth, but instead was responsive to plaintiff's own representations as to what he could and could not do at his job. See Wooten, 58 F.3d at 386 (finding that evidence bearing on employer's perception of employee's impairment indicates that its perception was not based upon speculation, stereotype or myth, but upon a doctor's written restriction of employee's physical abilities). Plaintiff informed Wooldridge that the effect of his treatment required that he modify his work schedule. See Plaintiff's Dep. at 22 (Plaintiff told his supervisors that he'd work as many hours as he could and when he started to feel tired, he'd go home). Contrary to plaintiff's interpretation, I find that plaintiff's testimony lends further support to defendant's argument that it did not regard plaintiff as disabled. In fact, it tends to show that defendant did not perceive plaintiff as substantially limited in the activity of working because, taking plaintiff's evidence as true, defendant encouraged plaintiff to work. See Penchishen, 932 F. Supp. at 675 (testimony that human

resources director suggested an alternative job to plaintiff that would be easier on her leg tends to show that defendant did not perceive plaintiff as substantially limited in the activities of walking or working because it encouraged her to work in a position that required walking); see also Gaul v. AT&T Bell Laboratories, Inc., 955 F. Supp 346, 351 (D.N.J. 1997) (finding that supervisors did not regard employee as having a substantially limiting impairment where employee was called back from disability leave to work on a special project); compare Cook v. Rhode Island, Dep't of Mental Health, Retardation, and Hospitals, 10 F.3d 17, 25 (1st Cir. 1993) (evidence warranted finding that appellant regarded plaintiff as substantially impaired where by his own admission, employer believed plaintiff's limitations foreclosed a broad range of employment options).

Therefore, plaintiff has failed to establish that he was "disabled" under the ADA because he has not raised a material issue as to whether he was substantially limited in a major life activity or that the defendant regarded him as disabled. As such, I need not discuss defendant's duty to accommodate, as the duty to reasonably accommodate is triggered only if plaintiff has a disability.

3. Retaliation

Plaintiff claims that defendant terminated his employment due to plaintiff's pursuit of benefits. Complaint ¶ 46. Specifically, plaintiff alleges that he "was the target of

retaliation due to his disability and multiple requests for benefits, enduring verbal harassment and demeaning references in regard to [his] disability." Memorandum of law in support of plaintiff's motion for partial summary judgment at 3.

The ADA prohibits a person from discriminating against "any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. § 12203(a). To succeed on a claim of discriminatory retaliation, the plaintiff has the burden of establishing a prima facie case of retaliation. Doe, 862 F. Supp. at 1316. The elements of a prima facie case of retaliation are that (1) plaintiff engaged in protected conduct; (2) was subject to an adverse employment action subsequent to such activity; and (3) that a causal link exists between the protected activity and the adverse action. Simmerman v. Hardee's Food Systems, Inc., 1996 WL 131948, at *10 (E.D. Pa. Mar. 26, 1996), citing Barber v. CSX Distribution Services, 68 F.3d 694, 701 (3d Cir. 1995) (citation omitted).

Case law has established that informal complaints to management constitute protected activity. Barber v. CSX Distribution Services, 68 F.3d 694, 701 (3d Cir. 1995); Sumner v. United States Postal Serv., 899 F.2d 203, 209 (2d Cir. 1990); Plakio v. Congregational Home, Inc., 902 F. Supp. 1383, 1392 (D. Kan. 1995). Protesting what an employee believes in good faith

to be a discriminatory practice is clearly protected conduct. Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1084 (3d Cir. 1996) (citations omitted). Plaintiff must reasonably believe discrimination is occurring but does not have to prove the merits of his complaint. Id. In this case, plaintiff believed that he was being discriminated against in retaliation for his requesting health benefits and accommodations. He informed Mike Neale, the landscape superintendent, of statements made to him by Bruce Fouracre, the assistant superintendent of the landscape division.[14] Plaintiff complained to Mr. Neale that, "[he] thought [he] was being harassed unduly, and [he] was recovering from a very serious illness and [he] didn't think Bruce should be treating [him] this way." Plaintiff's Dep. at 44. Plaintiff also testified as to his complaints, that "[t]here wasn't anything in writing. I told [Mr. Neale] I didn't like the way I was being treated, number one. I didn't like the way Bruce was putting all these restrictions as far as not talking about certain things, keeping my mouth shut, not informing Mike [Neale] about certain things that were going on, and just to keep quiet."

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14. According to plaintiff, Mr. Fouracre referred to plaintiff's illness in a derogatory manner, for example, calling him a "pill freak" because of the medication plaintiff took with meals. Plaintiff's Dep. at 44. Plaintiff also requested "better conditions as far as lunchroom and health benefits" and was told "to shut up," by Mr. Fouracre. Plaintiff's Dep. at 46. Plaintiff testified, "Bruce would tell me we can't put up with this much longer, you're going to have to get in here at starting time and finish at starting time. Bruce made one comment alluding to the fact that this isn't a very job-secure atmosphere, if this is going to continue like this." Plaintiff's Dep. at 33-34.

Plaintiff's Dep. at 47. Because plaintiff complained to his supervisor about what he believed, in good faith, was discriminatory treatment regarding his illness and his request for benefits, he has met the first part of the prima facie test.

As to the second part of the test, adverse employment action, plaintiff contends he was terminated in retaliation for his pursuit of benefits. Complaint at ¶ 46. Termination qualifies as adverse employment action under the ADA, and plaintiff was terminated from his position in January 1995. Simmerman, 1996 WL 131948, at *14. Thus, plaintiff meets the second prong of his prima facie case.

The last step in making a prima facie case requires evidence which connects the protected activity and the retaliatory claim. Id. The causal connection can be "established indirectly with circumstantial evidence . . . by showing that the protected activity was followed by discriminatory treatment." Sumner, 899 F.2d at 208. I find that plaintiff's termination in January 1995 occurred close enough in time to plaintiff's complaints so as to satisfy the third prong. Therefore, plaintiff satisfies the three threshold requirements necessary to establish a prima facie case of retaliation.

Once the plaintiff establishes a prima facie case, the "burden of production shifts to the defendant to articulate some legitimate, non-discriminatory reason for the employer's decision." Simmerman, 1996 WL 131948 at *14. Defendant has met this burden. Defendant claims that plaintiff's termination

stemmed from a lost contract which led to a reduction in the company's general work force. In the fall of 1994, Brighton Village, with over one hundred homes, failed to renew its maintenance contract with defendant for the coming year. Defendant's memorandum of law in support of its motion for summary judgment at 8. Defendant's Director of Grounds, Jerred Golden, testified that the terminations were based on seniority at the foreman level. Golden Dep. at 16-17. Plaintiff and another mowing foreman who had been hired after Plaintiff were both permanently laid off. Defendant's memorandum of law in support of its motion for summary judgment at 8; Att. A. to Defendant's answer to plaintiff's Interrogatory 12. In addition, from December 1994 to January 1995, eight laborers were terminated. Id.

To counter defendant's proffered legitimate non-discriminatory reason and defeat summary judgment, "the plaintiff must point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994) (finding that plaintiff failed to cast sufficient doubt on employer's reasons for its employment action). Plaintiff, to discredit defendant's non-discriminatory reason, must show "such weaknesses, implausibilities, inconsistencies, incoherencies, or

contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence . . . ." Fuentes, 32 F.3d at 765 (quotations and citations omitted). When considering summary judgment, the critical question is "whether the record could support an inference the employer did not act for a non-discriminatory reason." Lawrence v. National Westminster Bank New Jersey, 98 F.3d 61, 67 (3d Cir. 1996).

Plaintiff has simply not produced evidence that would allow a reasonable factfinder to find retaliation as the true motive behind plaintiff's termination. Simmerman, 1996 WL 131948 at *15; Harmer v. Virginia Electric and Power Co., 831 F. Supp. 1300, 1307-08 (E.D. Virginia 1993) (finding that plaintiff's evidence must "raise an inference of retaliation that has reasonable probability not mere possibility."). Plaintiff claims that other foremen as well as general laborers with less seniority than Mr. Nave were retained as employees at the time Mr. Nave's employment was terminated. Plaintiff's response to defendant's motion for summary judgment at 9. Plaintiff specifically points to Employee No. 6042 -- described as such in defendant's answer to plaintiff's Interrogatory #12 -- as a foreman with less seniority than himself who was nonetheless retained. Plaintiff's response to defendant's motion for summary judgment at 9. In response, defendant points out that this employee was initially hired as a laborer, and later promoted to mowing foreman, which places him in a different position

regarding lay-offs. Defendant's memorandum of law in support of its motion for summary judgment at 8, n.2. As to the other general laborers, the lay-offs were determined at the foreman level. As such, I find the fact that two general laborers hired after plaintiff were retained irrelevant to plaintiff's claims in that these laborers had a different job classification. See Golden Dep. at 17; Neale Dep. at 10.

The record reveals the loss of a large-scale contract, a plausible cause for reducing defendant's work force, and fails to support an inference of discrimination as the underlying motive behind plaintiff's termination. As such, I find that plaintiff has not effectively countered defendant's legitimate reason for his termination. Thus, plaintiff has failed to support his claim of retaliation. See Hickerson v. Armour, 1992 WL 391165, at *7-8 (W.D. Ky., July 17, 1992) (holding that where the record establishes that the alleged instances of retaliation were preceded by valid reasons, and plaintiff fails to present any evidence demonstrating some link between the actions and protected activity, summary judgment is appropriate). Accordingly, defendant's motion for summary judgment on plaintiff's claim of retaliation is granted.

B. Count II. Breach of Contract

Plaintiff's breach of contract claim is based on defendant's alleged obligation and breach to provide plaintiff with health care benefits in connection with his employment. Specifically, Plaintiff alleges that "[d]efendant was

contractually obligated to provide Plaintiff with benefits, which included, but were not limited to health care benefits, paid sick time as well as other benefits pursuant to Plaintiff's employment." Complaint at ¶ 36. Defendant argues that "[p]laintiff can point to no evidence, nor does any evidence exist, that a contract existed between plaintiff and defendant." Memorandum of law in support of defendant's motion for summary judgment at 16.

While the parties are addressing the merits of the breach of contract claim, I will concern myself, at least initially, with the question of whether having dismissed plaintiff's federal claims, I have, or should take, jurisdiction over this claim, which is couched in terms of state law.[15] I note that "courts have held that a plaintiff's exclusive remedy for a breach of contract resulting in the denial of benefits is

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15. In civil actions where the district courts have original jurisdiction, the district courts have "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C.A. § 1367(a). At its discretion, a court can decline to assert supplemental jurisdiction if it has dismissed all claims over which it has original jurisdiction. 28 U.S.C.A. § 1367(c); Growth Horizons, Inc. v. Delaware County, 983 F.2d 1277, 1284 n.14 (3d Cir. 1993) (noting that "federal courts shall exercise supplemental jurisdiction over pendent claims arising out of the same case or controversy and may decline to exercise jurisdiction if all federal claims are dismissed"); Timm v. Mead Corp., 32 F.3d 273, 276 (7th Cir. 1994) (finding that in most circumstances the court's discretion will "require declining jurisdiction over pendent state claims whenever the claim conferring federal jurisdiction is dismissed before trial").

an action under ERISA . . .." Arber v. Equitable Beneficial Life Ins. Co., 848 F. Supp. 1204, 1210 (E.D. Pa. 1994) (ERISA "comprehensively regulates employee welfare benefit plans that, through the purchase of insurance or otherwise, provide medical, surgical or hospital care, or benefits in the event of sickness, accident, disability or death."); see Ruble v. UNUM Life Ins. Co., 913 F.2d 295 (6th Cir. 1990). If plaintiff's claim is federal in nature I would have subject matter jurisdiction; if not, I would inquire into whether supplemental jurisdiction is appropriate. On the basis of the record and the parties' briefs, it appears that the issue pertains to the existence and enforcement of an employee benefit plan. However, neither party has addressed the question of jurisdiction in its brief. As such, I will not make any conclusion as to whether this court has jurisdiction over this matter, or address the merits, without briefing from the parties on the issue of jurisdiction. Summary judgment on this Count is therefore denied without prejudice.

C. Count II: Violation of Family Medical Leave Act

Plaintiff claims that Defendant denied benefits due him under the Family Medical Leave Act ("FMLA"). See Complaint at ¶¶ 43-45. To be eligible for coverage under the FMLA, an individual must be employed "for at least 12 months by the employer with respect to whom leave is requested under . . . this title; and for at least 1,250 hours of service with such employer during the previous 12-month period." 29 U.S.C. § 2611(2).

Plaintiff's Complaint states that he worked for defendant from February 23, 1994 until January 12, 1995. See Complaint at ¶ 8. The time of employment totaled less than eleven months and approximately 681 hours. See Memorandum of law in support of defendant's motion for summary judgment at 15. Therefore, as a matter of law plaintiff fails to meet the eligibility requirement for coverage under FMLA and summary judgment as to plaintiff's Count III claims is granted.

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

JOHN S. NAVE	:	CIVIL ACTION
	:	
v.	:	
	:	
WOOLDRIDGE CONSTRUCTION OF PENNSYLVANIA, INC.	:	NO. 96-2891

ORDER

AND NOW, this 30th day of June, 1997, upon consideration of defendant's motion for summary judgment and plaintiff's motion for partial summary judgment, and for the reasons set forth in the foregoing Memorandum Opinion, it is hereby ORDERED that defendant's motion for summary judgment is GRANTED as to counts I, III, and IV and plaintiff's motion for partial Summary judgment is DENIED. As to Count II, summary judgment is DENIED without prejudice. Plaintiff shall amend his complaint within 20 days, if he wishes to do so and can do so under Rule 11, to allege jurisdiction of this Court over Count II.

BY THE COURT:

Marjorie O. Rendell, J.