UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

KAREN DINGWERTH,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 4:05CV2003MLM**
	)	
MICHAEL J. ASTRUE,	)	
Commissioner of the Social Security	)	
Administration,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter is before the court pursuant to the Motion to Dismiss or, in the alternative, for Summary Judgment filed by Michael J. Astrue, Commissioner of Social Security ("Defendant" or the "SSA"). Doc. 20. Plaintiff Karen Dingwerth ("Plaintiff ") has filed a Response. Doc. 25. Defendant has filed a Reply. Doc. 26. The parties have consented to the jurisdiction of the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(c)(1). Doc. 10.

UNDISPUTED FACTS[1]

Plaintiff was employed as a Social Security Specialist, Claims Representative ("CR"), in the Social Security Administration ("SSA") in the St. Louis, Missouri, Field Office ("FO"). Plaintiff worked a total of twenty-five years for the federal government and worked at the SSA for approximately twenty-three of those years until her retirement in September 2003. Plaintiff worked a compressed work schedule in which she generally worked nine hour days and every other week she had one day off.

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[1] The facts as stated are undisputed unless otherwise stated.

On December 20, 2002, Plaintiff went to her physician in order to have a lump in her neck checked. A biopsy indicated that Plaintiff had either Hodgkin's or non-Hodgkin's lymphoma. On January 22, 2003, Plaintiff learned that her diagnosis was Stage I, non-Hodgkin's lymphoma, a form of cancer. Plaintiff asserts that non-Hodgkin's lymphoma is treatable, but not curable. Plaintiff was treated with Rituxan which was administered through an IV infusion. The Rituxan treatments occurred once a week for a four week period and were scheduled to occur every six months for a two year period. Receiving Rituxan treatments lasted approximately two to four hours.

In February or March 2003, after Plaintiff's first course of Rituxan, she learned that she was in remission from non-Hodgkin's lymphoma. She has remained in remission since that time. She last received Rituxan in August 2004. Plaintiff no longer takes medication for her non-Hodgkin's lymphoma, but receives checkups every six months. The Rituxan treatments did not affect Plaintiff's ability to function at either home or work in 2003. These treatments did not cause nausea and any fatigue Plaintiff may have experienced did not preclude her from working full days. In fact, Plaintiff worked overtime almost every time it was offered.

Plaintiff's managers in the Downtown FO testified in their depositions that it was not apparent that Plaintiff's treatment caused her to suffer any side effects. Plaintiff's leave slips reflect that in the eight and one-half month period beginning in January 2003 through her last day in the office on September 15, 2003, Plaintiff used fifty-six hours of sick leave. Def. Ex. C.

When asked in her deposition whether due to her cancer, in 2003, she was "substantially limited in [her] ability to care for [herself] as compared to an average person," Plaintiff responded that she did not understand the question. When asked if she was "substantially limited in her ability to care for [herself]," Plaintiff responded that she "felt [she] could do [her] job." When asked if she could "care for her personal needs," Plaintiff responded, "[y]es." Plaintiff further said that she was

not limited in her ability to "perform manual tasks," "to walk," "to hear," or "to read" due her cancer in 2003. She also testified that she was not "substantially limited in regard to any other major life activity that [she] could think of" as a result of her cancer in 2003. Plaintiff testified that her inability to walk was a side effect which came later, after her retirement. When asked in her deposition whether she had "any difficulty in 2003 performing the essential functions in [her] job after [she] had been diagnosed with cancer," Plaintiff responded, "[n]o." In particular, Plaintiff responded that she was "able to conduct interviews with claimants and develop and investigate and resolve their claims"; that she was "able to adjudicate and authorize payment on different types of claims without review"; and that she was "able to recognize the need for and approve the selection of representative payees for those individuals who could not handle their own benefits." Def. Ex. A at 20-25. Further, Plaintiff testified in her deposition that to the extent she was substantially limited, it was "[n]ot because of the disease itself, but because of the way people were reacting." Def. Ex. A at 23-14.

Plaintiff did not ask her managers to alter her job duties or workload nor did she ask for any other help performing the essential duties of her job. Plaintiff testified in her deposition that she told her manager, Pat Gaffigan, that "it was important for [her] that no one else knew about [her] condition or [she] felt that [she] would have to retire or leave the agency." Def. Ex. A at 26. When questioned if she asked "for any type of modification to the way [her] job was being performed to help [her]" perform her duties, Plaintiff responded, "no." Def. Ex. A at 26. Plaintiff then said that she thought "a request to keep information confidential [was] a request for a reasonable accommodation to [her] performing the essential functions of [her] job." Def. Ex. A at 26. Defendant contends, and Plaintiff denies, that SSA managers stated that none of their conversations with Plaintiff put them on notice that she was requesting any type of reasonable accommodation for any medical condition; that the managers did not think that Plaintiff's condition was terminal; and that the

managers did not perceive that Plaintiff was disabled due to any illness such that she required any type of accommodation to perform her job. Def. Facts, ¶ 5.

Pam Vassel was a co-worker of Plaintiff's and a "good friend." Plaintiff testified in her deposition that before tests were completed and before it was determined whether she had "Hodgkin's or non-Hodgkin's or what it was," she talked to Ms. Vassel about her situation because Ms. Vassel had "gone through cancer," because Plaintiff was "trying to get some information," and because she "needed to know a little bit [about] what to expect." Def. Ex. A at 56. Plaintiff told Ms. Vassel that she may have Hodgkin's or non-Hodgkin's lymphoma, "[t]hey weren't sure," and that she did not want Ms. Vassel to share this information with "anyone." Def. Ex. A at 56. Ms. Vassel did, however, share this information with another former co-worker and friend of Plaintiff's, Ernestine Heisserer. Upon learning that her medical information had been shared with Ms. Heisserer Plaintiff told both Ms. Heisserer and Ms. Vassel that everything was "fine." Plaintiff has no direct knowledge whether Ms. Vassel shared this information with anyone else.

Plaintiff was never denied a request for either sick or annual leave while working at the SSA. Her SSA managers never required Plaintiff to specify the reason she was requesting sick or annual leave prior to their approval of the leave. Plaintiff's managers never requested that Plaintiff provide medical documentation to support any request for sick leave. Further, Plaintiff testified that the Downtown FO was fairly flexible in granting leave. On January 8, 2003, and January 9, 2003, Plaintiff submitted three leave slips to Michelle Minden for approval. Ms. Minden was the Operations Supervisor "("OS") in the Downtown FO and was Plaintiff's first-line supervisor. Ms. Minden approved the leave requests. On two of the leave slips in the "Remarks" box, Plaintiff had typed the word "Tests." Plaintiff testified that after Ms. Minden approved the leave requests, Ms. Minden approached Plaintiff and asked if everything was okay. Plaintiff further testified that she believed that

Ms. Minden asked the question out of either concern for her condition or curiosity. Ms. Minden did not ask Plaintiff why she was seeking treatment; she did not ask any specifics about Plaintiff's requests for leave; and she did not tell Plaintiff that she needed to know more specific information in order to approve Plaintiff's leave requests. Nonetheless, Plaintiff told Ms. Minden that she had either Hodgkin's or non-Hodgkin's lymphoma and that she did not want her co-workers to know about her illness. Ms. Minden testified that she told Plaintiff that she could not be the only manager to know about Plaintiff's condition and that she would have to tell her direct line of supervisors. Ms. Minden further testified that Plaintiff did not object. Plaintiff, however, contends that Ms. Minden did not tell her that she needed to tell her supervisors. Def. Ex. D at 2; Def. Ex. A at 44.

On the same day that Plaintiff had the above described conversation with Ms. Minden, Ms. Minden told Pat Gaffigan, District Manager of the Downtown FO and Plaintiff's third-line supervisor, that Plaintiff had an illness which may require some unscheduled absences. Ms. Minden told Ms. Gaffigan that Plaintiff did not want her co-workers to know about her illness. Ms. Minden also told Ms. Gaffigan that she told Plaintiff that Ms. Minden would need to tell her direct line supervisors about Plaintiff's medical condition.

Approximately a couple of weeks later, Plaintiff initiated a conversation with Ms. Gaffigan and told her she had lymphoma. Pursuant to Plaintiff's request, Ms. Gaffigan signed Plaintiff's leave slips. Ms. Gaffigan did not inquire as to the reason Plaintiff was requesting leave. Plaintiff voluntarily told Ms. Gaffigan that he she had non-Hodgkin's lymphoma because she felt like she had a responsibility to tell management and also told Ms. Gaffigan about her treatments. Ms. Gaffigan agreed to allow Plaintiff to switch her day off, if necessary, for treatments. Plaintiff testified that upon Plaintiff's telling Ms. Gaffigan about her condition, Ms. Gaffigan asked Plaintiff how she was doing; that she told Ms. Gaffigan to keep "this information confidential"; that she believed that Ms. Gaffigan

improperly disclosed this information; and that she did not know when Ms. Gaffigan did so. Def. Ex. A at 47-48. Plaintiff contends, and the SSA denies, that she advised Ms. Gaffigan that she might retire or leave her job if her co-workers knew about her condition. Doc. 25 at 2 (citing Def. Ex. A at 26).

Ms. Gaffigan informed Jim Gottlieb, the Assistant District Manager ("ADM") of the Downtown FO and Plaintiff's second-line supervisor, about Plaintiff's illness because Ms. Gaffigan believed that Mr. Gottlieb needed to know this information as he occasionally signed Plaintiff's leave slips and, therefore, might need to know why Plaintiff was occasionally switching her day off. Additionally, when Lisha Tucker became OS in the Downtown FO and Plaintiff's first-line supervisor, Ms. Gaffigan informed her about Plaintiff's illness for the same reasons. Ms. Gaffigan told both Mr. Gottlieb and Ms. Tucker that Plaintiff wanted her medical information kept confidential. Defendant contends, and Plaintiff denies, that Plaintiff gave her permission for Ms. Gaffigan to tell necessary management members about her illness.

As the DM of the Downtown FO, Ms. Gaffigan oversaw a cluster of SSA Field Offices in the St. Louis downtown district which consisted of the Downtown FO and the Northeast FO, the later of which is located in North County and managed by Kathy Gibbs. Ms. Gibbs was a part of Ms. Gaffigan's management team and reported directly to Ms. Gaffigan. Performance goals for the two FO's were expected to be achieved on a cluster basis. While each office strived to contribute its part, it was the total cluster performance that mattered. All resources, including staffing, for the cluster were distributed from the Area Director to Ms. Gaffigan for further redistribution as she saw fit. Ms. Gaffigan expected Mr. Gottlieb and Ms. Gibbs to work together in order for the cluster to be successful. The two offices shifted workloads, resources, and employees, through details, as

necessary. As a team, Ms. Gaffigan, Mr. Gottlieb, and Ms. Gibbs did the recruiting and hiring of all replacement staff.

In the spring of 2003, Ms. Gaffigan received a request for workload assistance from Ms. Gibbs. Ms. Gaffigan and Ms. Gibbs frequently discussed all of the details of the cluster operation, which included personnel matters, because the staff was co-mingled. In an effort to explain why the Downtown FO would not be able to provide assistance to Ms. Gibbs' office, Ms. Gaffigan informed Ms. Gibbs that the Downtown FO was experiencing a loss of personnel due to retirement, illness, and two unfilled claims representative positions. It was common knowledge that one employee in the Downtown FO had a brain tumor and was receiving treatment. It was at this time that Ms. Gaffigan told Ms. Gibbs that Plaintiff had lymphoma. Ms. Gaffigan did not tell Ms. Gibbs that Plaintiff had a terminal condition because she did not believe that Plaintiff's condition was terminal. Although neither Plaintiff nor Ms. Gaffigan knew whether Plaintiff's illness would cause her to miss much work, Ms. Gaffigan believed it was a factor to consider when evaluating whether her office could provide workload assistance to the Northeast FO. Ms. Gaffigan told Ms. Gibbs to keep the information regarding Plaintiff's illness confidential.

Ms. Gibbs held a Title XVI unit meeting at the Northeast FO a few days after her conversation with Ms. Gaffigan. According to Ms. Gibbs, those in attendance were five employees. It is undisputed that Ms. Gibbs told the assembled group that their office would not receive any assistance from the Downtown FO because one person had retired and because another retirement was imminent. Ms. Gibbs asserts in an affidavit that she also told the assembled group that their office would not receive assistance from the Downtown FO because two people in the office were "seriously ill" and receiving medical treatment; that she does not recall using the words "terminal"

or "terminally ill"; that she never identified Plaintiff or any other employee by name; and that she never stated what illnesses any employee had. Def. Ex. I, ¶ 4.

Sometime in March or April 2003, Sharon Byrd, who worked at the Northeast FO, asked Ms. Tucker, who was "terminally ill." Ms. Tucker told Ms. Byrd that she did not know anything about it and asked Ms. Byrd why she thought someone was terminally ill in the Downtown FO. Ms. Byrd responded that Ms. Gibbs held a meeting in which she mentioned that an employee of the Downtown FO was terminally ill. Ms. Gibbs never identified Plaintiff as an employee who was ill.

Ms. Tucker told Ms. Gaffigan about her conversation with Ms. Byrd. Ms. Gaffigan then called Ms. Gibbs to discuss the situation. Ms. Gibbs told Ms. Gaffigan that she had not stated that anyone was "terminally ill" nor had she identified anyone by name when talking to her staff. Ms. Gaffigan told Ms. Gibbs that she should not have explained the failure to receive workload assistance in the manner in which she did and further told her that she should hold a second meeting and retract her statement.

The next day Ms. Gibbs held a second meeting with the Title XVI unit and told the unit that if they received the impression that individuals in the Downtown FO were terminally ill, they were wrong. Ms. Gibbs explained that individuals could receive medical treatment without being terminally ill and used herself as an example reminding her staff that she had precancerous cells, underwent surgery, but was just fine. After the meeting, Ms. Gibbs called Ms. Gaffigan and informed her that she had retracted the statement. Ms. Gaffigan did not question the Northeast FO employees to determine what was said in the meeting because she believed this would only worsen the situation. Ms. Gibbs never heard any of her employees speculating as to whether an individual in the Downtown FO was ill.

After Ms. Gibbs's initial meeting with her staff, Dianne Berra, a Title XVI Technical Expert in the Downtown FO, went to Ms. Gaffigan's office and asked if someone in the Downtown FO was seriously ill. Ms. Berra did not mention anyone by name. Ms. Gaffigan denied that anyone in their office was seriously ill. No other employee ever asked Ms. Gaffigan a question related to this situation. Additionally, neither Ms. Gaffigan nor any other manager ever overheard any of the employees in the Downtown FO speculating as to whether an individual in their office was seriously or terminally ill. Also, the Downtown FO managers never saw or heard any of the employees in the Downtown FO treat Plaintiff any differently than other employees in the office.

In her deposition Plaintiff testified that in March or April 2003 she started to notice that glances of her co-workers were different. She felt that they would look her up and down to see if anything was different. She also believed that when they talked to her that they would try to drop hints to see if they could find out something. Plaintiff never confronted her co-workers on this issue and never asked why they w ere looking at her differently. Plaintiff also testified that her co-workers would "make a fuss" when she switched her day off. She believed they did this to try to find out if she was the one who was ill.

On August 27, 2007, Sandy Mack, a co-worker, told Plaintiff that people in the office were concerned about her; that they thought she was ill; and that they thought Plaintiff had terminal cancer. Ms. Mack further told Plaintiff that people believed she was ill based upon a meeting Ms. Gibbs had with the Northeast FO. Plaintiff has never actually spoken to anyone who was at the meeting.

Plaintiff stated in her deposition that she was very upset upon hearing about Ms. Gibbs's meeting and went to talk to Mr. Gottlieb; that Mr. Gottlieb was on vacation at the time; and that Plaintiff left him a phone message stating that she was upset and that her co-workers were speculating that she was the individual who was ill. Ms. Gaffigan called Plaintiff and left her a message

apologizing for the situation and for the fact that her co-workers were gossiping. Ms. Gaffigan tried to comfort Plaintiff and told her that she was proud of Plaintiff and would talk to her in person when she returned to the office. When Ms. Gaffigan returned she had a lengthy discussion with Plaintiff and again tried to comfort her. Ms. Gaffigan also offered to talk to Plaintiff's co-workers. Plaintiff declined this offer.

Plaintiff testified that she told Pat Williams, Plaintiff's co-worker and the office union representative, about her medical condition after learning about Ms. Gibbs's meeting in order to obtain advice. On September 15, 2003, Ms. Williams told Plaintiff that when someone was out of the office for a couple of days, that individual would be asked if they were the person who was "terminally ill" upon their return. Plaintiff believed that it was a game for her co-workers to try to figure out who was ill in the office. She was very upset and went into the back of the office where Mr. Gottlieb was and began crying. Mr. Gottlieb suggested that they go talk to Ms. Gaffigan. Plaintiff then told Ms. Gaffigan and Mr. Gottlieb that she could no longer continue to work; that her co-workers were trying to figure out who was seriously ill; and that they believed it was her.

Both Ms. Gaffigan and Mr. Gottlieb tried to persuade Plaintiff not to retire and expressed to her that she was a valued employee and an asset to the SSA. Ms. Gaffigan asked Plaintiff what she could do to rectify the situation and covered a range of options with her. Ms. Gaffigan offered to talk to the staff and ask them to respect Plaintiff's privacy and not discuss her illness. Plaintiff declined Ms. Gaffigan's offers because she did not want any further discussions about her illness. Defendant asserts, and Plaintiff denies, that Ms. Gaffigan offered to let Plaintiff talk to the staff personally and request that they respect her privacy. Ms. Gaffigan assured Plaintiff that no member of management in the Downtown FO had informed any of her co-workers that she was ill. Plaintiff continued to state that she could no longer work in the Downtown FO. Ms. Gaffigan then offered Plaintiff as much

personal or sick leave, with or without pay, that she needed in order to think more thoroughly about the situation. Ms. Gaffigan stressed that Plaintiff should take a couple of weeks off to collect herself and make a thoughtful decision about her future. Both Mr. Gottlieb and Ms. Gaffigan continued to reassure Plaintiff that they did not want her to leave, but neither could convince her to continue working with the SSA.

After having the aforementioned conversation with Plaintiff, Ms. Gaffigan called the then Area Director, Ethel Johnson, to inform her of the situation. Ms. Gaffigan and Ms. Johnson discussed the possibility of Plaintiff's transferring to another SSA FO in order for her to feel more comfortable or having Ms. Johnson speak to the Downtown FO and ask them to respect Plaintiff's privacy. Plaintiff called Ms. Johnson that same day to tell her that she believed her privacy had been breached and to discuss the possibility of early retirement. Ms. Johnson stated in an affidavit that Plaintiff was noticeably upset on the telephone. Plaintiff agrees that Ms. Johnson offered her personal support and several options in an attempt to change her mind about retirement. Ms. Johnson offered to meet with the Downtown staff and request that her co-workers respect her privacy. Plaintiff declined this offer. Ms. Johnson also offered to transfer Plaintiff to another office outside of Ms. Gaffigan's area but Plaintiff believed that rumors would follow her. In an effort to avoid Plaintiff's early retirement Ms. Johnson suggested that Plaintiff take some personal time off of work to think about the situation and discuss it with her husband. Ms. Johnson gave Plaintiff her home phone number in case she needed someone to talk to or discuss the situation further.

Ms. Johnson had a few telephone conversations with Plaintiff during this period. Ms. Johnson continued to offer her support and assistance in order for Plaintiff to remain employed with the SSA. Defendant contends, and Plaintiff denies, that Ms. Johnson suggested that if the previous options she offered were not suitable to Plaintiff that Plaintiff stay with the SSA until April 2004 at which time

she would be eligible for regular retirement rather than early retirement. Plaintiff declined the options offered to her by Ms. Johnson and chose to take early retirement. Pursuant to her request, Plaintiff was allowed to come into the Downtown FO on a weekend when no one was around to clean out her desk. Plaintiff's retirement was effective September 30, 2003.

Plaintiff asserts that she could not work in the Downtown FO because she was an "absolute nervous wreck" that someone might ask her if she was the one who was "terminally ill"; that she "couldn't stand to see the look in some of the employee's eyes"; that she did not want her co-workers looking at her with sympathy or asking how she felt if she began coughing or missed several days of work due to a cold; that she did not believe she could continue to work in that environment and believed that stress would threaten her remission; that she believed that she could not work in another office because people would talk and would want to know why she left her previous office; and that the choice she made to take early retirement is the only one which she felt would keep her in remission. Plaintiff admits that she had choices other than early retirement presented to her by the SSA management to ease her stress.

On October 8, 2003, Loretta Kelley, an EEO counselor, informed Ms. Johnson that Plaintiff had sought EEO counseling and presented Ms. Johnson with Plaintiff's request for redress for the alleged discrimination. In response to Plaintiff's request for redress, Ms. Johnson sent Plaintiff a letter dated October 29, 2003, in which Ms. Johnson stated that she did not believe that the SSA had improperly disclosed Plaintiff's health information. Ms. Johnson also stated in the October 29, 2003 letter that because Plaintiff was a valued employee the SSA was willing to reinstate Plaintiff as a Claims Representative in the office of her choice in the St. Louis area. Ms. Johnson also stated that the SSA would restore any leave Plaintiff took in conjunction with her early retirement. Also, in the letter Ms. Johnson set forth her findings in regard to Plaintiff's early retirement and stated that

Plaintiff had voluntarily disclosed her medical condition to her immediate supervisor and to Ms. Gaffigan; that Ms. Gaffigan told Plaintiff that she may need to disclose Plaintiff's condition to other managers in order to coordinate the workflow in Ms. Gaffigan's cluster of offices; that Ms. Johnson believed that Ms. Gaffigan was warranted in telling Ms. Gibbs about Plaintiff's medical condition in response to a request for workload assistance; that, although Ms. Gibbs subsequently stated in a meeting with her staff that the Downtown FO could not provide assistance due to illness and retirement, she never identified Plaintiff as an individual with an illness; and that no manager ever identified Plaintiff as an individual with any type of illness to any of Plaintiff's colleagues in the Downtown FO or any other SSA office. In her letter Ms. Johnson also reiterated that the SSA tried to assist Plaintiff in feeling more comfortable at work and offered many options in order for her to stay employed with the SSA but that Plaintiff declined all of the options. Plaintiff declined Ms. Johnson's October 29, 2003 offer to return to the SSA as a Claims Representative in the FO of her choice in the St. Louis area.

Plaintiff alleges in her Complaint in the instant lawsuit that the SSA violated the Rehabilitation Act of 1973, 29 U.S.C. § 791, et seq., by "discriminating against her on the basis of her disabilities, including its failure to accommodate them." Compl., Count 1. Plaintiff also alleges that she retired as a direct result of the SSA's discriminatory conduct and that, therefore, her discharge "amounted to constructive discharge" in violation of the Rehabilitation Act. Compl., Count 2.

LEGAL STANDARD FOR A MOTION TO DISMISS

A court may dismiss a cause of action for failure to state a claim if it appears beyond a doubt that the plaintiff can prove no set of facts in support of its claim that would entitle it to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Alexander v. Peffer, 993 F.2d 1348, 1349 (8th Cir. 1993). "The issue is not whether plaintiff will ultimately prevail but whether the claimant is entitled to offer

evidence to support [its] claim." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). See also Bennett v. Berg, 685 F.2d 1053, 1058 (8th Cir. 1982) (a complaint should not be dismissed merely because the court doubts that a plaintiff will be able to prove all of the necessary factual allegations). The court must review the complaint most favorably to the plaintiff and take all well-pleaded allegations as true to determine whether the plaintiff is entitled to relief. Conley, 355 U.S. at 45-46. A dismissal under Rule 12(b)(6) should be granted only in the unusual case in which a plaintiff has presented allegations that show on the face of the complaint that there is some insuperable bar to relief. Coleman v. Watt, 40 F.3d 255, 258 (8th Cir. 1994).

STANDARD FOR SUMMARY JUDGMENT

The court may grant a motion for summary judgment 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 judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The substantive law determines which facts are critical and which are irrelevant. Only disputes over facts that might affect the outcome will properly preclude summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Summary judgment is not proper if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Id. See also Fenny v. Dakota, Minn. & E.R.R. Co., 327 F.3d 707, 711 (8th Cir. 2003) (holding that an issue is genuine "if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party").

A moving party always bears the burden of informing the court of the basis of its motion. Celotex, 477 U.S. at 323. Once the moving party discharges this burden, the nonmoving party must set forth specific facts demonstrating that there is a dispute as to a genuine issue of material fact, not

the "mere existence of some alleged factual dispute." Fed. R. Civ. P. 56(e); Anderson, 477 U.S. at 247. The nonmoving party may not rest upon mere allegations or denials of his pleading. Id. at 256.

In passing on a motion for summary judgment, the court must view the facts in the light most favorable to the nonmoving party and all justifiable inferences are to be drawn in its favor. Id. at 255; Raschick v. Prudent Supply, Inc., 830 F.2d 1497, 1499 (8th Cir. 1987). The court's function is not to weigh the evidence, but to determine whether there is a genuine issue for trial. Anderson, 477 U.S. at 249. However, "[t]he mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient." Id. at 252. "Factual disputes that are irrelevant or unnecessary" will not preclude summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). With these principles in mind, the court turns to an analysis of Defendant's Motion for Summary Judgment.

DISCUSSION

As stated above, Plaintiff alleges that Defendant discriminated against her in violation of the Rehabilitation Act of 1973, 29 U.S.C. § 791, et seq., by failing to accommodate her disability and by forcing her to retire due to its discriminatory conduct. Defendant contends in its Motion for Summary Judgment that Plaintiff cannot establish a prima facie case of failure to accommodate under the Rehabilitation Act and that it did not constructively discharge Plaintiff.

A. Legal Framework for Failure to Accommodate:

The evaluation of claims of disability discrimination under the Rehabilitation Act is governed by the standards applied to claims under the Americans with Disabilities Act ("ADA"). 29 U.S.C. § 705(9)(B); 29 U.S.C. § 791(g); 29 C.F.R. § 1614.203(a)(1). See also Joelson v. Dep't of Veterans, 177 F. Supp.2d 967, 970 (D.N.D. 2001).

As a preliminary matter, the court notes that Plaintiff does not allege in her Complaint that the SSA's alleged disclosure of her medical information itself violated the Rehabilitation Act which Act incorporates the confidentiality requirements of the ADA. 29 U.S.C. § § 791(g); 794(d). The ADA, however, "limits the scope of information that employers may seek and disclose about their employees' medical condition." Cossette v. Minnesota Power & Light, 188 F.3d 964, 969-70 (8th Cir. 1999) (citing 42 U.S.C. §12112(d) (1994)). The ADA permits employers to make inquiries as to whether an employee can perform job related functions. 42 U.S.C. §12112(d)(4)(B); 29 C.F.R. § 1630.14(c). Information obtained pursuant to such a request must be treated as confidential medical information except under certain circumstances. 42 U.S.C. §12112(d)(3)(B)(i)-(iii); 29 C.F.R. §1630.14(c).[2] One of these circumstances permits supervisors and managers to be informed concerning necessary restrictions on the work or duties of the employee. 42 U.S.C. §12112(d)(3)(B)(i).

Unlawful discrimination under the Rehabilitation Act includes "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 of [the employer]." 42 U.S.C. § 12112(b)(5)(A). The burden shifting analysis articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), is applicable to claims of disability discrimination under the ADA and thus, applicable to claims of discrimination under the Rehabilitation Act. See Sherman v. Runyon, 235 F.3d 406, 409 (8th Cir. 2000). Under the

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[2] 29 C.F.R. § 1630.14(c) provides, in relevant part:

> (c) Examination of employees. A covered entity may require a medical examination (and/or inquiry) of an employee that is job-related and consistent with business necessity. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

McDonnell Douglas framework, a plaintiff must establish a prima facie case of disability discrimination. To establish a prima facie case of discrimination the for failure to accommodate, a plaintiff must show: (1) that she has a disability within the meaning of the ADA; (2) that she is qualified to perform the essential functions of his job, with or without reasonable accommodation; and (3) that she suffered an adverse employment action because of his disability. Thompson v. Bi-State Dev. Agency, 463 F.3d 821 (8th Cir. 2006); Kammueller v. Loomis, Fargo & Co., 383 F.3d 779, 781 (8th Cir. 2004); Moysis v. DTG Datanet, 278 F.3d 819, 824-25 (8th Cir. 2002); Kiel v. Select Artificials, Inc., 169 F.3d 1131, 1135 (8th Cir. 1999) (en banc). When making a failure to accommodate claim, a plaintiff must also establish that "reasonable accommodation was possible, and, with it, [s]he can perform the essential functions of the job." Kammueller, 383 F.3d at 786 (citing Burchett v. Target Corp., 340 F.3d 510, 517 (8th Cir.2003)). A plaintiff must further show that the employer knew of, and failed to reasonably accommodate the plaintiff's disability. Id. at 787.

If a plaintiff establishes a prima facie case, the burden then shifts to the defendant to offer a legitimate, nondiscriminatory reason for the adverse employment action. Crawford v. Runyon, 37 F.3d 1338, 1341 (8th Cir. 1994). A plaintiff retains the burden of proving the employer's articulated reason is a pretext for discrimination. Id.

As stated above, to establish a prima facie case, a plaintiff must first show that she is disabled. 42 U.S.C. § 12102(2), defines disability as follows:

> The term "disability" means, with respect to an individual--
>
> (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.
>
> Further, 29 C.F.R. § 1630.2(l)(1)-(3) states:
>
> (l) Is regarded as having such an impairment means:

> (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 none of the impairments defined in paragraph (h) (1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

"Major life activities" are defined as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R.§1630.2(i); Gretillat v. Care Initiatives, 481 F.3d 649, 652 (8th Cir. 2007); Shipley v. University City, 195 F.3d 1020, 1022 (8th Cir. 2000) (citing Brandon v. Abbott, 524 U.S. 624, 638-39 (1998)). "More generally, they include 'activities that are of central importance to daily life.'" Gretillat, 481 F.3d at 652 (quoting Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184, 197 (2002)). Major life activities are considered "substantially limited" when a person is:

> i) Unable to perform a major life activity that the average person in the general population can perform; or
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1).

B. Application of Law to Facts:

In the matter under consideration Defendant does not dispute that Plaintiff has a diagnosed medical condition, non-Hodgkin's lymphoma. In order to establish a prima facie case Plaintiff must establish that her non-Hodgkin's lymphoma substantially limited a major life activity. 42 U.S.C. §12102(2); 29 C.F.R. § 1630.2(l)(1)-(3). The determination of whether an individual has a disability is not based on the diagnosis of the impairment, but on the effect that the impairment has on the life of an individual. See Gretillat, 481 F.3d at 654, n.4 ("A medical diagnosis of an impairment cannot

qualify as a disability per se; instead, a plaintiff 'must satisfy the ADA's demanding standard in each individual case in the context of the major life activity asserted.'"). See also Hirsch v. Nat'l Mall & Serv., Inc., 989 F.Supp. 977, 981 (N.D. Ill. 1997) ("[T]he determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has but rather on the effect of that impairment on the life of the individual.") (quoting Taylor v. Principal Fin. Group, Inc., 93 F.3d 155, 164 (5th Cir. 1996).

An individual is not necessarily disabled because his or her disease is life threatening or because it is ultimately terminal. Id. Thus, a person is not disabled simply because he or she has cancer. Id. In Hirsch, the plaintiff's husband had non-Hodgkin's lymphoma which was ultimately terminal. The court determined, however, that the husband was not disabled because the plaintiff had not provided evidence to show that he was substantially limited in a major life activity due to his cancer. 989 F.Supp. at 981. While acknowledging that an individual with cancer *may* be considered disabled for purposes of the ADA, the court held that the plaintiff failed to establish that the husband's performance of major life activities was limited by his cancer. Id. See also Liljedahl v. Ryder Student Transp. Servs., 341 F.3d 836 (8th Cir. 2003) (holding that lung cancer which required surgery was not a disability because it did not limit the individual's major life activities); Demming v. Housing & Redev. Auth., 66 F.3d 950 (8th Cir. 1995) (holding that the plaintiff's thyroid cancer was not a disability, despite hospitalization because the plaintiff did not show that it limited her major life activities).

An individual is not necessarily disabled because she is forced to occasionally be absent from work as was Plaintiff in the matter under consideration. Hirsch, 989 F. Supp. at 981. Significantly, it is undisputed that Plaintiff's Rituxan treatments did not affect her ability to function at work during the relevant period and that her treatments did not cause side effects such as nausea. Although

Plaintiff suffered some fatigue, this fatigue did not preclude her from working full days and, in fact, she was able to work overtime when it was offered. During the eight and one-half month period from January 2003 through her last day of employment, September 15, 2003, Plaintiff used only fifty-six hours of sick leave. Indeed, when asked if she was limited in regard to her ability to perform major life activities, Plaintiff testified that in 2003 she was able to perform her job, including its specific requirements; that she was able to care for her personal needs; and that she was not limited in her ability to perform manual tasks, walk, hear, and read due to her disease. Further, Plaintiff testified in her deposition that a little over a month after she was diagnosed with non-Hodgkin's lymphoma she was informed that she was in remission and that she has continued to remain in remission. The court finds, therefore, that the undisputed facts establish that during the relevant period Plaintiff was not limited in her ability to perform any major life activity and was not limited in her ability to perform her job. See 42 U.S.C. §12102(2); 29 C.F. R. § 1630.2(l)(1); Gretillat, 481 F.3d at 654, n.4; Liljedahl, 341 F.3d 836; Demming, 66 F.3d 950; Hirsch, 989 F. Supp. at 981. As such, the court finds that, despite her diagnosis of non-Hodgkin's lymphoma, during all relevant periods Plaintiff was not disabled as a result of her non-Hodgkin's lymphoma. See Gretillat, 481 F.3d at 654, n.4; Liljedahl, 341 F.3d 836; Demming, 66 F.3d 950; Hirsch. 989 F.Supp. at 981.

A plaintiff may establish that she is disabled under the Rehabilitation Act if she was "regarded as having a disability." 42 U.S.C. § 12101(2)(C). As noted by the Eighth Circuit in Knutson v. Ag Processing, Inc., 394 F.3d 1047, 1050 (8th Cir. 2005), "[t]he 'regarded as' portion of the ADA was 'intended to combat the effects of archaic attitudes, erroneous perceptions, and myths that work to the disadvantage of persons with or regarded as having disabilities.'" (quoting Wooten v. Farmland Foods, 58 F.3d 382, 385 (8th Cir.1995) (internal quotation and citation omitted). A plaintiff may be found disabled under the "regarded as" provision when he or she is perceived as being unable to

perform major life functions. Id. (citing Cooper v. Olin Corp., Winchester Div., 246 F.3d 1083 (8th Cir.2001)).

Therefore, although Plaintiff in the matter under consideration was not under a disability as defined under the Rehabilitation Act, she may nonetheless establish that she was disabled for purposes of the Rehabilitation Act if she can demonstrate that her supervisors regarded her having an impairment which limited one or more major life activity. See Aucutt v. Six Flags Over Mid-America, Inc., 85 F.3d 1311, 1319 (8th Cir. 1996). The mere fact that supervisors have knowledge of an individual's disease or impairment does not establish that they "regarded [the individual] as having a disabling impairment." Id. The undisputed facts establish that Plaintiff's supervisors including Ms. Gaffigan, Ms. Minden, Mr. Gottlieb, Ms. Tucker, and Ms. Gibbs, knew that Plaintiff had non-Hodgkin's lymphoma. Plaintiff has failed, however, to suggest any evidence that Defendant's supervisors or managers perceived or treated her as having a "substantially limiting impairment." As stated above, Plaintiff even worked overtime when offered and did not ever ask that she be given any type of accommodation regarding the requirements of her job.[3]

Plaintiff argues that it was not her cancer which prevented her from working but rather "it was the disclosure to her colleagues that she had that condition that" prevented her from working. Doc. 25 at 6. Because her co-workers regarded her cancer as a disability, Plaintiff further argues that she is disabled under the Rehabilitation Act. Plaintiff contends that she was unable to work because of the "glances" she received from co-workers; because co-workers looked her up and down; because co-workers dropped hints in an effort to obtain information; because co-workers made a fuss when she switched her day off; and because people in the SSA office thought and/or speculated that she

[3] To the extent that Plaintiff contends that her request for confidentiality was a request for accommodation within the meaning of the Rehabilitation Act, the court will address this issue below.

was terminally ill. Plaintiff presents no facts, however, to suggest that either her co-workers or her supervisors perceived her as being unable to perform major life functions including the performance of her job. As such, the court finds that the undisputed facts establish that Plaintiff's supervisors did not treat her as having an impairment which limited a major life activity and that Plaintiff was not "regarded as having a disability" by either supervisors or co-workers. 42 U.S.C. §12101(2)(C); 29 C.F.R. §1630.2(l)(3); Aucutt, 85 F.3d at 1319. The court finds, therefore, that the undisputed facts establish that Plaintiff was not disabled pursuant to the Rehabilitation Act, 42 U.S.C. 12101(2)(A)-(C). Because the undisputed facts establish that Plaintiff was not disabled pursuant to the Rehabilitation Act, 42 U.S.C. 12101(2)(A)-(C), Plaintiff has failed to establish the first prong of the requirements for a prima facie case of discrimination. See Thompson, 463 F.3d 821; Moysis, 278 F.3d at 824-25; Kiel, 169 F.3d at 1135. The court finds, therefore, that summary judgment should be granted in favor of Defendant.

The court will, arguendo, consider whether Plaintiff has met her burden pursuant to the second prong of the test for a prima facie case of discrimination based on a failure to accommodate a disability. Reasonable accommodation means "modifications or adjustments to the work environment, or the manner or circumstances under which the position held ... 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). First, it is undisputed that Plaintiff *did not request accommodation* in the essential functions of her job. Second, it is undisputed that Plaintiff was *able to perform the essential functions* of her job; therefore, she did not require accommodation regarding the manner in which her job was customarily performed. Third, Plaintiff's supervisors had *no reason to believe that Plaintiff required accommodation in the essential functions of her job*. Fourth, Plaintiff's only request of her supervisors was that her medical information be kept confidential. This request,

however, was not a request for a modification or adjustment in Plaintiff's job duties or in circumstances which would make it otherwise possible for her to perform her job. Fifth, to the extent that supervisors found it necessary to share information about Plaintiff's disease among themselves, the undisputed facts establish that this was done in order to facilitate Plaintiff's requests for leave as well as to facilitate staffing requirements. Sharing information for such purposes is consistent with the ADA's exception to the requirement that confidential medical information be kept confidential. See 42 U.S.C. § 12112(d)(4)((B); 29 C.F.R. § 1630.14(c) ; Cossette, 188 F.3d at 969-70. To the extent Plaintiff disputes Defendant's position that Ms. Gaffigan told her that she may need to share information regarding Plaintiff's illness with other managers, this disputed fact is not material as sharing of information was consistent with the applicable statute and regulations. Sixth, to the extent that Plaintiff's supervisors inquired of her upon Plaintiff's requesting leave, the undisputed facts establish that supervisors did not ask specifics about her medical information. When Ms. Minten and Ms. Gaffigan signed Plaintiff's leave slips and inquired whether Plaintiff was okay, they did not ask Plaintiff why she was seeking treatment nor did they tell Plaintiff that they needed to know further information in order to approve the leave slips. Ms. Gaffigan only asked if Plaintiff was okay after Plaintiff volunteered that she had non-Hodgkin's lymphoma. The Enforcement Guidance of Equal Employment Opportunity Commission ("EEOC"), Disability-Related Inquiries and Medical Examinations of Employees Under the ADA states, in relevant part, that "[q]uestions that are not likely to elicit information about a disability are *not* disability-related inquiries and, therefore, are not prohibited under the ADA." Def. Ex. L at 4 (emphasis in original). The Enforcement Guidance of the EEOC further includes as an example of such a permissible inquiry "asking generally about an employee's well being (e.g., How are you?)," and "asking an employee who looks tired or ill if s/he is feeling okay." Id. The court finds, to the extent Ms. Minten and/or Ms. Gaffigan inquired as to

whether Plaintiff was okay, that their inquiries were permissible inquiries pursuant to the EEOC Enforcement Guidance.

Seventh, Plaintiff does not suggest that she was treated differently than similarly situated employees without a disability regarding the benefits and privileges of employment.

Eighth, pursuant to Plaintiff's request for confidentiality supervisors made an effort to assure that Plaintiff's co-workers did not learn about Plaintiff's disease. Ms. Gaffigan told Ms. Gibbs to keep the information regarding Plaintiff's illness confidential when explaining why the Downtown FO could not provide assistance to the Northeast FO. In her meetings with employees regarding staffing Ms. Gibbs did not disclose the names of the employees who were ill; she never mentioned Plaintiff's name. Pursuant to Ms. Gaffigan's instruction, Ms. Gibbs conducted a second meeting with Northeast FO employees during which Ms. Gibbs specifically stated that if employees believed that individuals at the Downtown FO were terminally ill they were wrong. When asked by Ms. Berra if anyone in the Downtown FO was terminally ill, Ms. Gaffigan denied that anyone was seriously ill. Further, in an effort to accommodate Plaintiff and put her at ease, Ms. Gaffigan apologized to her, tried to comfort her, and, on two occasions, offered to talk to Plaintiff's co-workers. Additionally, Mr. Gottlieb and Ms. Gaffigan tried to persuade Plaintiff not to retire; Ms. Gaffigan offered Plaintiff as much personal or sick leave as she needed, with or without pay, to think about her situation; Ms. Johnson offered to instruct staff to respect Plaintiff's privacy; and ultimately, Ms. Johnson offered Plaintiff the option of returning to the SSA as a Claims Representative in the office of her choice. Plaintiff declined to accept any of these offers from SSA supervisors.

Ninth, to the extent that it is disputed whether or not Ms. Gibbs used the term "terminal cancer" at the first meeting she conducted, use of this term is not material as the undisputed facts establish that Ms. Gibbs did not mention Plaintiff by name or suggest in any way that Plaintiff was

ill. Tenth, it was Plaintiff herself who chose to disclose her medical information to her co-worker, Ms. Vassel, who in turn told Ms. Heisserer. Plaintiff also told Ms. Williams, Plaintiff's co-worker and union representative.

Thus, to the extent that Plaintiff requested accommodation in the form of keeping her medical condition confidential, her supervisors and managers complied with that request to the fullest extent possible and in a manner consistent with the requirements of the applicable statutory framework and EEOC Enforcement Guidance. See 42 U.S.C. §12112(b)(5)(A); Kammueller, 383 F.3d at 786; EEOC Enforcement Guidance at 4. Under such circumstances the court finds that the undisputed facts establish that Plaintiff has failed to meet her burden pursuant to the second prong of the test for a prima facie case of discrimination based on a failure to accommodate a disability. See Kammueller, 383 F.3d at 786.

B. Constructive Discharge:

Plaintiff alleges that Defendant's discriminating against her in violation of the Rehabilitation Act resulted in her being unable to work and that, therefore, she was constructively discharged. The Eighth Circuit has explained constructive discharge as follows:

> Just like any other discharge, a constructive discharge is an adverse employment action. West v. Marion Merrell Dow, Inc., 54 F.3d 493, 497 (8th Cir.1995). A constructive discharge occurs "when an employer deliberately renders the employee's working conditions intolerable and thus forces him to quit his job." Smith v. World Ins. Co., 38 F.3d 1456, 1460 (8th Cir.1994) (citation omitted). Under the objective standard applicable to constructive discharge claims, "[a]n employee may not be ***unreasonably sensitive*** to [his] working environment." West, 54 F.3d at 497. A constructive discharge takes place only when a reasonable person would find working conditions intolerable. Id. "Part of an employee's obligation to be reasonable is an obligation not to assume the worst and not to jump to conclusions too fast." Id. at 498 (citation omitted). "An employee who quits without giving [his] employer a reasonable chance to work out a problem is not constructively discharged." Id.

Thompson v. Bi-State Dev. Agency, 463 F.3d 821, 825 (8th Cir. 2006) (emphasis added).

As found above, the undisputed facts establish that Plaintiff was not disabled within the meaning of the Rehabilitation Act; that to the extent that Plaintiff's supervisors and managers disclosed Plaintiff's medical information, they did so in a manner permitted by the applicable statutes and regulations; and that the SSA did not fail to accommodate Plaintiff in violation of the Rehabilitation Act. Further, SSA supervisors and managers encouraged Plaintiff to remain on the job, not to retire, to take time off if she so desired, and to return to the office of her choice after she chose to retire. In response to Plaintiff's contention that Ms. Gibbs made it known to employees that Plaintiff was ill, Ms. Gibbs made every effort to let it be known that no employee of the St. Louis office was terminally ill. While Plaintiff contends that mere speculation by her co-workers that she was terminally or seriously ill created an intolerable working condition which caused her to retire, such a reaction on Plaintiff's part is "unreasonably sensitive." Thompson, 463 F.3d at 825. The court finds, therefore, that the undisputed facts establish that the SSA did not make Plaintiff's working conditions intolerable; that the SSA did not create a working environment which could cause a reasonable person to retire; and that Plaintiff did not suffer an adverse employment action as a result of any unlawful discrimination on the part of the SSA. See id. As such, the court finds that the undisputed facts establish that Plaintiff was not constructively discharged. See id. Quite to the contrary, SSA supervisors and managers made every possible effort to create a comfortable working environment for Plaintiff and to encourage Plaintiff to continue her employment with the SSA.

CONCLUSION

The court finds that the undisputed facts establish that the SSA did not fail to accommodate Plaintiff and did not constructively discharge Plaintiff in violation of the Rehabilitation Act and that, therefore, summary judgment should be granted in favor of the SSA.

Accordingly,

IT IS HEREBY ORDERED that the Motion to Dismiss filed by Defendant Michael J. Astrue, Commissioner of Social Security, is **DENIED AS MOOT**: Doc. 20-1

IT IS FURTHER ORDERED that the Motion for Summary Judgment filed by Defendant Michael J. Astrue, Commissioner of Social Security, is **GRANTED**; Doc. 20-2.

IT IS FURTHER ORDERED that a Judgment incorporating by reference this Memorandum Opinion shall issue this same date.

/s/Mary Ann L. Medler
MARY ANN L. MEDLER
UNITED STATES MAGISTRATE JUDGE

Dated this 28th day of June, 2007.