

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

**MELISSA BEAN,** )  
 )  
 **Plaintiff,** )  
 )  
 **v.** )  
 )  
 **SANFORD HEALTH CARE FACILITY,** )  
 **INC.,** )  
 )  
 **Defendant** )

**Docket No. 96-200-P-C**

**RECOMMENDED DECISION ON DEFENDANT’S MOTION FOR  
SUMMARY JUDGMENT AND MEMORANDUM DECISION  
ON PLAINTIFF’S MOTION FOR LEAVE TO AMEND  
COMPLAINT AND ON PARTIES’ MOTIONS TO STRIKE**

In this action alleging employment discrimination on the basis of sex and pregnancy, the defendant has moved for summary judgment. Shortly after the defendant filed its motion, the plaintiff moved for leave to amend her complaint to add a claim under the Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq.*, and the defendant thereafter moved to strike the plaintiff’s claims for compensatory and punitive damages and to award sanctions. Also pending are three motions to strike various affidavits, or portions of affidavits, filed in connection with the motion for summary judgment. I deny the motion to amend and recommend that the court grant the motion for summary judgment. The motions to strike will be addressed as they become relevant in the body of this recommended decision.

**I. Summary Judgment Standards**

Summary judgment is appropriate only 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). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and “give the party the benefit of all reasonable inferences to be drawn in its favor.” *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir.) (citing *Celotex*, 477 U.S. at 324), *cert. denied*, 132 L. Ed. 2d 255 (1995); Fed. R. Civ. P. 56(e). “This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof.” *International Assn. of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

## **II. Factual Background**

The summary judgment record reveals the following undisputed facts. The plaintiff was

employed by the defendant as a certified nurse's assistant ("CNA") from January 30, 1990 to August 5, 1995. Affidavit of Ellen Johnston, R.N. ("Johnston Aff."), attached to Defendant's Motion for Summary Judgment and Incorporated Memorandum of Law ("Defendant's Memorandum") (Docket No. 18), ¶ 2.<sup>1</sup> Her duties included assisting the defendant's residents with feeding, bathing, dressing, getting in and out of bed, turning in bed, and ambulating. *Id.* ¶ 3; Deposition of Melissa A. Bean ("Plaintiff's Dep."), attached to Defendant's Memorandum, at 16-17. Many of the residents are elderly, with severe mental or physical disabilities; while caring for them, a CNA routinely lifts in excess of 20 pounds, bends, stoops, and performs other physically demanding tasks. Johnston Aff. ¶ 3.

The plaintiff learned in March 1995 that she was pregnant. Plaintiff's Dep. at 50. On April 28, 1995 the plaintiff's doctor restricted her to lifting no more than 20 pounds. Exh. 3 to Plaintiff's Dep. The plaintiff gave the doctor's note with this restriction to her supervisor. Johnston Aff. ¶¶ 2, 4. The plaintiff thereafter was assigned to care for residents who were non-combative or needed less weight-bearing assistance and she received assistance from other CNAs with heavy lifting. *Id.* ¶ 4. On May 30, 1995 the plaintiff's doctor changed the maximum weight that the plaintiff was allowed to lift from 20 pounds to 15 pounds. Exh. 4 to Plaintiff's Dep. In June 1995 the plaintiff informed her supervisor of this fact. Johnston Aff. ¶ 5. Either in June or August the plaintiff's

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<sup>1</sup> The plaintiff has moved to strike paragraph 15 of the Johnston Affidavit and Exhibit I thereto. Docket No. 23. The defendant responds that the paragraph and document are offered to show Ms. Johnston's state of mind, making them admissible at trial and making 26 M.R.S.A. § 1194(12), which prohibits the use of a finding of fact or conclusion of law by a deputy of the Maine Bureau of Employment Security for purposes of collateral estoppel, irrelevant. Docket No. 32. Inasmuch as I have not relied on paragraph 15 or Exhibit I in formulating my recommended decision on the defendant's motion for summary judgment, the motion to strike requires no action at this time. If this case proceeds to trial, and to the extent the plaintiff envisions a trial issue involving the same material, she is free to file an *in limine* motion for consideration by the trial judge.

supervisor asked her whether she would be willing to work the day shift; the plaintiff declined. *Id.* ¶ 6; Affidavit of Melissa Bean (“Plaintiff’s Aff.”), part of Exh. B to Plaintiff’s Statement of Disputed Material Facts (“Plaintiff’s SMF”) (part of Docket No. 25), ¶ 14.

The plaintiff had received benefits under the defendant’s short-term disability insurance program for employees for approximately six weeks before an earlier pregnancy. Johnston Aff. ¶ 7. After discussing her eligibility for such benefits with her supervisor in June 1995, the plaintiff applied for them on June 16, 1995 and stopped working. *Id.* ¶¶ 7-8, 10. The supervisor spoke to the plaintiff’s doctor about the application for disability benefits. *Id.* ¶ 9. No one told the plaintiff that she would be fired or that her pay would be cut if she did not file for disability benefits. Plaintiff’s Dep. at 102-03. Her supervisor did not directly order her to stop working. *Id.* at 105. However, the plaintiff understood that her supervisor had in effect directed her to stop working. Plaintiff’s Aff. ¶¶ 14, 16.

On August 8, 1995 the plaintiff informed her supervisor that her application for short-term disability benefits had been denied by the insurer and inquired about returning to work. Johnston Aff. ¶ 13. Her supervisor wrote to the plaintiff on August 29, 1995 asking her for a note from her doctor stating that she would be able to perform the duties of her job “before we can assume that you are able to work.” *Id.* Exh. G. All employees of the defendant who return to work after medical leave are required to present such a note. *Id.* ¶ 13. In August or September 1995 the plaintiff applied for unemployment benefits. Bean Dep. at 124. Her application for unemployment benefits stated that she had voluntarily left her employment with the defendant in August 1995. *Id.* at 142. The supervisor wrote to the plaintiff on September 5, 1995 stating that the employer understood that she was no longer an employee, as a result of the award of unemployment benefits, and informing her

of her right to continue her health and dental insurance. Johnston Aff. ¶ 16 & Exh. F to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment ("Plaintiff's Opposition") (part of Docket No. 25).

The employer subsequently received a letter from the plaintiff's attorney noting that the plaintiff was capable of performing duties listed on the defendant's "CNA modified duty sheet" and requesting that she be re-employed immediately. *Id.* ¶ 17 & Exh. J. The employer's so-called "Modified Duty Program" differs from the light duty work offered to the plaintiff before she applied for disability benefits. *Id.* ¶ 18. It was not offered to the plaintiff. *Id.* The plaintiff filed this action on June 26, 1996. Docket No. 1.

### **III. The Motion to Amend**

The plaintiff filed her motion to amend on April 16, 1997 (Docket No. 21), about three weeks after the defendant filed its motion for summary judgment. A proposed scheduling order issued on December 2, 1996 setting a deadline of December 23, 1996 for amendment of the pleadings. Docket No. 15. When neither party objected to it, it became the operative scheduling order of the court. The discovery deadline in this case was March 24, 1997 and the deadline for filing motions was March 31, 1997. *Id.* The case appeared on the July 1997 trial list, although it has been removed from that list pending resolution of the defendant's motion for summary judgment.

The motion seeks to add a claim for violation of the Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq.* Docket No. 22. The defendant has objected to the motion on the grounds that it is untimely, is not made in good faith, and will cause undue prejudice to the defendant. Docket No. 31. The plaintiff's counsel asserts that he learned for the first time on March 19, 1997, during

the deposition of Ellen Johnston, the plaintiff's supervisor, that she never informed the plaintiff that she had been terminated on August 5, 1995 and that only upon learning this fact did it become "crystal clear that the Defendant had deliberately violated the federal Family and Medical Leave Act." Affidavit of Ronald R. Coles, Esq. ("Coles Aff."), attached to Plaintiff's SMF, ¶¶ 5-6. The plaintiff also asserts that there will be no need for additional discovery if she is allowed to add this claim, that trial will not be delayed, and that the defendant will not be prejudiced, because the facts upon which the claim is based are the same facts which provide the basis for the existing discrimination claim. Plaintiff's Reply Memorandum (Docket No. 38) at 1.

When a plaintiff seeks to amend her complaint after the deadline for doing so set forth in the court's scheduling order, she may do so only if "justice requires" under Fed. R. Civ. P. 15(a) and if she can show "good cause" under Fed. R. Civ. P. 16(b). *Abbott v. Bragdon*, 893 F. Supp. 99, 101 (D. Me. 1995); *see also Stepanischen v. Merchants Despatch Trans. Corp.*, 722 F.2d 922, 933 (1st Cir. 1983) (burden on moving party when considerable time elapsed between filing of complaint and filing of motion to amend). Particularly where, as here, the plaintiff argues that the proposed new theory of liability is based on the same facts pled in her original complaint, amendment after the scheduling deadline is not favored in the absence of justification for the delay. *Tiernan v. Blyth, Eastman, Dillon & Co.*, 719 F.2d 1, 4 (1st Cir. 1983). The first deadline established by the court's scheduling order is that for amendment of the pleadings. It is incumbent upon the parties to address themselves to other possible claims and to conduct discovery so that they may explore that question in a timely fashion, in order that they may be able to file timely amendments. The information that counsel for the plaintiff claims to have discovered only a month before he filed the motion to amend is not information that could not have been gleaned earlier, had he chosen to conduct discovery

earlier.<sup>2</sup>

In addition, counsel's assertion that the intentional element of the alleged violation of the Family and Medical Leave Act is what was discovered in the March 1997 deposition provides no justification for his delay because intent is not an element of a claim under the Act. 29 U.S.C. § 2612. Finally, the assertion that the addition of this claim will not cause further delay or necessitate further discovery may not be correct. For example, the Act has a notice provision which may well not have been addressed in discovery to date. 29 U.S.C. § 2612(e).<sup>3</sup> Under the circumstances presented by the plaintiff, she has not shown "good cause" for the delay in requesting leave to add this claim to her complaint. Accordingly, I deny the motion. *See Jordan v. Hawker Dayton Corp.*, 62 F.3d 29, 33 (1st Cir. 1995) (motion to amend complaint filed four months after deadline set in scheduling order and few days before discovery deadline properly denied); *Riofrio Anda v. Ralston Purina Co.*, 959 F.2d 1149, 1155 (1st Cir. 1992) (no error to deny motion to amend filed two months after scheduling order deadline).

#### **IV. The Motion for Summary Judgment**

The defendant asserts that it is entitled to summary judgment because the plaintiff cannot establish a prima facie case of discrimination and because, even if she has established a prima facie case, she cannot establish that the defendant's stated non-discriminatory reason for its employment

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<sup>2</sup> Indeed, the plaintiff herself would have known even before suit was commenced whether or not she had ever been informed by her supervisor or anyone else acting on behalf of the defendant that her employment had been terminated on August 5, 1995 or on any other date.

<sup>3</sup> See also *Smith v. F. W. Morse & Co.*, 76 F.3d 413, 424 n. 8 (1st Cir. 1996) (for claim brought under Family and Medical Leave Act, "a different set of rules would obtain" from those applicable to a Title VII pregnancy discrimination claim).

decision concerning her is a pretext for discrimination.

### **A. Applicable Legal Standard**

The Pregnancy Discrimination Act (“PDA”), 42 U.S.C. § 2000e(k), requires that pregnant employees be treated “the same for all employment-related purposes as nonpregnant employees similarly situated with respect to their ability or inability to work.” *International Union, United Auto. Workers v. Johnson Controls, Inc.*, 499 U. S. 187, 204-05 (1991) (citation omitted). The Act does not require preferential treatment of pregnancy. *California Fed. Sav. & Loan Ass’n v. Guerra*, 479 U. S. 272, 285-86 (1987). Like other allegations of discrimination under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.*, a claim under section 2000e(k) may be one of disparate impact or disparate treatment. The plaintiff clearly makes a claim of disparate treatment. Plaintiff’s Opposition at 1. The plaintiff also apparently concedes that she has no direct evidence of intentional discrimination by the defendant, because she proceeds immediately to discuss the burden-shifting framework applicable to Title VII claims. *See Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1224 (6th Cir. 1996) (to establish prima facie case under PDA, plaintiff may present direct evidence, present statistical proof, or use the test established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

Under *McDonnell Douglas* the plaintiff carries the initial burden of establishing a prima facie case of employment discrimination. If that is done, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the challenged action. If that articulation is made, the plaintiff must demonstrate that the presumptively valid reason for the action is in fact a pretext covering up an impermissibly discriminatory action. *Olivera v. Nestle Puerto Rico, Inc.*, 922 F.2d

43, 46 (1st Cir. 1990). The plaintiff must “elucidate specific facts which would enable a jury to find that the reason given was not only a sham, but a sham intended to cover up the employer’s real motive.” *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 9 (1st Cir. 1990). Articulating legitimate non-discriminatory reasons for the employment action does not mean that the employer must prove absence of discriminatory motive. *Board of Trustees v. Sweeney*, 439 U. S. 24, 25 (1978). The plaintiff retains the burden of persuasion. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

To establish a prima facie case of discriminatory treatment the plaintiff must show that she was in a protected category, that she was denied certain benefits, that she was qualified to receive those benefits and that employees similarly situated to her received those benefits or systematically better treatment. *Troupe v. May Dep’t Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994).<sup>4</sup> The same analysis applies to the plaintiff’s claim under the Maine Human Rights Act, 5 M.R.S.A. § 4551 *et seq.* *Soileau v. Guilford of Maine, Inc.*, 928 F. Supp. 37, 45 (D. Me. 1996); *Winston v. Maine Technical College Sys.*, 631 A.2d 70, 74 (Me. 1993). There is no dispute for purposes of this motion that the plaintiff was in a protected category and that she was not offered participation in the defendant’s “CNA Modified Duty Program” or given light work within her lifting restrictions when she requested it after her application for disability benefits was denied by the insurance carrier. The remaining elements of the prima facie burden are in dispute.

## **B. Analysis**

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<sup>4</sup> The plaintiff does not pursue the possible alternative claim that she was replaced by a person who was not pregnant. *Troupe*, 20 F.3d at 736.

## 1. The Prima Facie Case

The defendant first argues that the plaintiff cannot establish a prima facie case of discrimination due to pregnancy because she was “not qualified to do her job as a CNA.” Defendant’s Memorandum at 7. This is the third element of a plaintiff’s prima facie case. Because many of the duties of a CNA require lifting in excess of 20 pounds, the defendant asserts, the plaintiff’s restriction, established by her physician, to lifting no more than 20 pounds rendered the plaintiff “not qualified to perform her job as a CNA.” *Id.* at 8. The plaintiff addresses this aspect of the defendant’s argument only by stressing the existence of the defendant’s “CNA Modified Duty program.” While this response does not really address the defendant’s position, the defendant’s argument is in fact tautological. If not for her pregnancy the plaintiff would not have had the lifting restrictions. By the defendant’s argument, pregnancy would not be protected under the PDA if it led to a physical restriction making it impossible for the employee to perform a significant aspect of her job duties. The PDA would thus be rendered meaningless for many, if not most, pregnant women. In addition, the argument ignores the fact that the defendant did initially make accommodations for the plaintiff when she first received the 20-pound lifting restriction. It was only when the limit was reduced to 15 pounds that the defendant decided that it could not provide light-duty work for the plaintiff within her restrictions for the next five months. The summary judgment record does not support a conclusion that the defendant is entitled to judgment as a matter of law on this element of the plaintiff’s prima facie case.

The defendant next argues that no adverse employment action was taken against the plaintiff, addressing the second element of the prima facie case. This argument is based on the assertions that the plaintiff voluntarily left her employment with the defendant when she applied for disability

benefits and that the defendant “never outright refused to return Bean to her position as a CNA.” Defendant’s Memorandum at 9. Whether the plaintiff voluntarily left her employment is a fact very much in dispute on the summary judgment record. While the defendant may never have “outright” refused to return Bean to her CNA position, the record reveals more than one instance in which the plaintiff can reasonably argue that the defendant indirectly or without written record chose not to re-employ her. This is also a matter in dispute on the summary judgment record.

The crux of the summary judgment motion on the issue of the plaintiff’s prima facie case is whether there is evidence that similarly situated employees who were not pregnant were treated more favorably, the fourth element of a prima facie case. The plaintiff offers evidence of only one instance of such alleged disparate treatment. She asserts that employee Carol Wood was allowed to remain in the “CNA Modified Duty Program” for approximately three months after injuring her back on the job, resulting in a restriction in her ability to lift weights. Plaintiff’s Aff. ¶ 31.<sup>5</sup> Ms. Wood, she

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<sup>5</sup> The defendant has moved to strike this paragraph of the plaintiff’s affidavit on the grounds that she lacks personal knowledge of the matter stated therein and that she testified at deposition that she did not recall any employee of the defendant being placed in the “Modified Duty Program.” Docket No. 30. As clarified by the plaintiff’s supplemental affidavit, Exh. A to Plaintiff’s Memorandum in Opposition to Defendant’s Motion to Strike (“Plaintiff’s Memorandum in Opposition”) (Docket No. 37), the plaintiff’s personal knowledge of the information for which I have cited her first affidavit is established. The fact that Ms. Wood was placed in this program is confirmed by the deposition testimony of Ellen Johnston. Deposition of Ellen K. Johnston (“Johnston Dep.”), attached to Plaintiff’s Memorandum in Opposition, at 64. The portions of the plaintiff’s deposition upon which the defendant relies do not contradict the plaintiff’s affidavit because the question asked at deposition was whether the plaintiff knew of a CNA who was placed in the “Modified Duty Program.” The defendant itself makes much of the fact that Ms. Wood was *not* a CNA and that no CNA has participated in the program. *E.g.*, Affidavit of Deborah Graffam Hurd (“Hurd Aff.”), attached to Defendant’s Reply Brief (Docket No. 33), ¶¶ 6-7. This argument provides no ground for striking paragraph 31. The first sentence of paragraph 31, however, is a conclusion that is not supported by the rest of the paragraph. The defendant’s motion is granted as to the first sentence of paragraph 31 of the plaintiff’s affidavit dated April 15, 1997 and otherwise denied.

asserts, returned to regular duty, reinjured her back, and spent an additional two months in the program. *Id.* The plaintiff specifically asked to be allowed to participate in the “CNA Modified Duty Program” by letter of her attorney dated September 7, 1995, Exh. J to Johnston Aff., approximately six weeks before her child was born, Affidavit of Kathleen C. Morris, M.D. (“Morris Aff.”), attached to Plaintiff’s SMF, ¶ 5.<sup>6</sup>

The defendant responds that Ms. Wood was not a CNA, but rather a nursing clerical assistant/certified medication assistant, with the ability to administer medications and to perform clerical work, both light-duty tasks which the plaintiff was not qualified to perform. Hurd Aff. ¶ 6. Thus, it argues, Ms. Wood was not “similarly situated” with the plaintiff. The defendant admits, however, that Ms. Wood did participate in the “CNA Modified Duty Program.” Johnston Dep. at 64. It also asserts that no CNA has ever participated in the program. Hurd Aff. ¶ 4. The defendant

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<sup>6</sup> The defendant has moved to strike the affidavits of Dr. Morris and Margaret Brown, attached to Plaintiff’s SMF, because they present expert testimony and neither person was designated as an expert witness in accordance with the court’s scheduling order in this case. Docket No. 29. The plaintiff responds that Ms. Brown’s testimony is not offered as that of an expert, but as “merely factual background material on light/modified duty experiences of a nursing home administrator operating a nursing home of similar bed capacity and having virtually the same number of employees as the Defendant herein.” Plaintiff’s Memorandum in Opposition to Defendant’s Motion to Strike (Docket No. 35) at 1. This is in fact virtually a definition of expert testimony. *See* Fed. R. Evid. 702 (“specialized knowledge [that] will assist the trier of fact”). Ms. Brown’s testimony is not mentioned in Plaintiff’s SMF and for that reason alone may not be considered in connection with the plaintiff’s opposition to the motion for summary judgment. In any event, the motion to strike is granted because Ms. Brown was not timely designated as an expert witness. The request for sanctions is denied.

As to Dr. Morris, the plaintiff asserts that she may rely upon the expert testimony in Dr. Morris’s affidavit because the defendant designated Dr. Morris as an expert witness and because the defendant is not prejudiced by her reliance on that testimony. The second assertion is valid only because, in ruling on the motion for summary judgment, I have refrained from relying on any portions of Dr. Morris’s affidavit that contain opinion testimony. Specifically, I rely on paragraph 5 of the affidavit only for the date of birth of the plaintiff’s child, a statement of fact known to Dr. Morris. If this case goes to trial, the defendant is free to seek, by a motion *in limine*, to preclude the potential expert testimony of Dr. Morris.

also argues that the program is designed for short-term, progressive work assignments that will return injured employees to full duty, and that the plaintiff's pregnancy meant that she could not do progressive work that would return her to full duty. Finally, the defendant asserts that it could not provide the plaintiff with the sort of light duty to which it assigned her in May and June through the remainder of her pregnancy since such assignments were not available for extended periods of time. Hurd Aff. ¶ 7.

It is not necessarily the case that only those employees whom the defendant employs as CNAs are similarly situated with the plaintiff for purposes of analyzing the plaintiff's prima facie burden under the PDA. The PDA "requires only that the employee be similar in his or her 'ability or inability to work.' 42 U.S.C. § 2000e(k)." *Ensley-Gaines*, 100 F.3d at 1226. The only evidence in the summary judgment record concerning Ms. Wood's inability to work is that she had a job-related back injury that limited her ability to lift weights and that she was able to return to full duty after three months in the modified duty program. The plaintiff was similarly situated in June 1995 when her only stated limitation was lifting of weights over fifteen pounds. From the summary judgment record, it appears that the plaintiff and Ms. Wood were "similar in [their] . . . inability to work." *Id.*

The first distinction argued by the defendant, that the modified duty program is intended only for employees who can work their way back to full capacity in a limited period of time, founders on the lack of evidence that anyone knew at the time Ms. Wood entered the program how long it would take for her to complete it and return to full capacity. In addition, by the time the plaintiff left active employment with the defendant, on June 16, she was only four months away from her delivery date of October 20, Morris Aff. ¶ 5, and the ensuing "customary" six weeks of maternity leave, Johnston

Aff. ¶ 7. The difference between Ms. Wood’s actual three months (and, shortly thereafter, an additional two months) on the program and the projected actual time that the plaintiff would have spent in the program does not support the defendant’s argument that the plaintiff’s use of the program would be “long term.”

The distinction concerning Ms. Wood’s actual job duties presents a closer question. However, information bearing on this issue does not establish that Ms. Wood’s specific “inability to work” — the inability to lift an unspecified amount of weight — was any different from that of the plaintiff. Because the plaintiff has established that there are disputed issues of material fact as to all of the elements of her prima facie case, the burden shifts to the defendant under *McDonnell Douglas* to articulate a legitimate, nondiscriminatory reason for its action. Evidence concerning Ms. Wood’s actual job duties is more applicable to the question of the employer’s legitimate explanation for its actions concerning the plaintiff, the next issue to be addressed under the *McDonnell Douglas* framework.

## **2. The Employer’s Nondiscriminatory Reasons**

The defendant offers three assertedly nondiscriminatory reasons for its actions toward the plaintiff: (1) that the plaintiff voluntarily went out on disability; (2) that the plaintiff’s doctor determined that she could not perform the duties of her position; and (3) that the “extended period of time” of the plaintiff’s need for lifting restrictions is “generally not available” from her employer, presumably as a business or financial decision. In order to avoid summary judgment, the plaintiff must show that these reasons were pretextual *and* that the defendant’s failure to provide her with work after June 16 was due to intentional discrimination on the basis of her pregnancy. *Fennell v.*

*First Step Designs, Ltd.*, 83 F.3d 526, 536 (1st Cir. 1996). She cannot establish that the defendant's stated reasons were merely a pretext "solely by contesting the objective veracity of [the employer's] action." *Morgan v. Massachusetts Gen. Hosp.*, 901 F.2d 186, 191 (1st Cir. 1990). Rather, the plaintiff must provide additional evidence of the employer's discriminatory intent. *Hoepfner v. Crotched Mountain Rehabilitation Ctr., Inc.*, 31 F.3d 9, 17 (1st Cir. 1994). A finding that the employer's explanation is not believable is not enough. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 519 (1993). In assessing pretext, the court's focus must be on the perception of the decisionmaker, "that is, whether the *employer* believed its stated reason to be credible." *Goldman v. First Nat'l Bank of Boston*, 985 F.2d 1113, 1118 (1st Cir. 1993) (emphasis in original).

The plaintiff devotes much effort to contesting the objective veracity of the defendant's asserted non-discriminatory reasons and pointing out alleged inconsistencies in explanations for its actions given in different forums or at different times. There is no evidence of mendacity by the defendant in the plaintiff's submission. *See Byrd v. Ronayne*, 61 F.3d 1026, 1031 (1st Cir. 1995) (factfinder may infer intentional discrimination if he believes the defendant's reason is pretextual, particularly if it is "accompanied by a suspicion of mendacity"). Neither of the plaintiff's approaches is adequately directed to discharging her burden to demonstrate pretext, and neither will be addressed further here.

As to the defendant's first asserted non-discriminatory reason for its actions, however, there are material facts in dispute. The plaintiff states that her supervisor told her on June 15 that there was no light duty work available for her to perform which did not require lifting beyond her fifteen pound restriction and that she could not work after June 16. Plaintiff's Aff. ¶¶ 13, 16. She states that she told Deborah Graffam, the defendant's business manager, on or around August 4, that her

disability claim had been denied and asked Graffam to look into whether she could come back to work; Graffam told her that she could not return to work until after her baby was born. *Id.* ¶ 19. The plaintiff wrote to her supervisor on August 8, asking to return to work. Johnston Aff. ¶ 13. The plaintiff's attorney wrote to the defendant on September 7, asking that she be returned to work in the modified duty program. *Id.* ¶ 17. Each of these facts is inconsistent with a belief by the defendant that the plaintiff was voluntarily out of work.

The defendant's second asserted reason is that the plaintiff's doctor determined that she could not work. This assertion is contradicted by the admissible portions of the doctor's affidavit, although that information has not been shown to have been available to the defendant until the September 7 letter from the plaintiff's attorney. *Id.* Exh. J. The defendant bases its argument on the doctor's response to a question in the plaintiff's disability benefits application, in which she indicates that "the patient [was] unable to perform all of the material and substantial duties of his/her *own occupation* on a full-time basis" as of June 15, 1995 and until six weeks after delivery. *Id.* Exh. D at [6] (emphasis in original). It is clear that the doctor completed this form at the defendant's request. *Id.* ¶ 9. Of course, the defendant already had the notes from the doctor establishing lifting restrictions. If the defendant was no longer able to make accommodations for the plaintiff's restrictions after June 15, it could reasonably have relied on the lifting limitation imposed by the plaintiff's doctor, without regard to the disability application form.

The defendant's final reason is offered in two parts. First, the defendant attempts, not altogether successfully, to distinguish its existing "CNA Modified Duty Program" as not applicable to the plaintiff's pregnancy; then, it offers a general "business reason" that it could no longer provide the accommodations provided from sometime in April through June 15, requiring other CNAs to

assist the plaintiff with the lifting tasks that are a “routine” part of the job. *Id.* ¶ 3. The program, Exh. C to Plaintiff’s Memorandum in Opposition, is designed to be temporary and to provide progressive work assignments. *Id.* at [2]. While the program is limited to a “reasonable time for healing,” that time limit is not otherwise defined. *Id.* It is intended to “accommodate specific physical limitations sustained as a result of a work related injury or illness,” *id.*, but the defendant does not argue that the program was not available to the plaintiff because her pregnancy was not work-related. Rather, the defendant argues that pregnancy is not a short-term injury or illness that is amenable to progressive work assignments. This argument would carry more weight if the defendant had made an attempt to define “temporary,” “short-term,” or the other time-related terms it uses in discussing this issue. Under the circumstances, the plaintiff has provided evidence, through the Wood incident, that calls into question the reasonableness of the defendant’s professed belief in this distinction.

However, as to the larger question of the availability of work for the plaintiff within her lifting restrictions over the remaining five months of her pregnancy, the result is different. Bearing in mind that there is no legal requirement that an employer favor an employee due to her pregnancy, *e.g.*, *Troupe*, 20 F.3d at 738 (PDA does not require employers to make it easier for pregnant women to work); *Sussman v. Salem, Saxon & Nielson, P.A.*, 153 F.R.D. 689, 693 (M.D. Fla. 1994) (same), the defendant has shown why there would be light-duty work available for employees like Ms. Wood when there was none for the plaintiff. The plaintiff has not challenged the defendant’s statement that she was not qualified to administer medications or perform clerical tasks. The plaintiff worked the evening shift, when there were fewer staff than would have been available to assist her with lifting tasks on the day shift. *Johnston Aff.* ¶¶ 2, 6.

Perhaps the most telling evidence in support of the defendant's position is provided by the plaintiff herself. At deposition, she testified that at least two, and perhaps three, of the CNAs employed by the defendant during the five years of the plaintiff's employment there had become pregnant and had continued to work through their pregnancies with lifting restrictions. Plaintiff's Deposition at 89-90. In a very similar factual context, the federal district court in Massachusetts found that such evidence "is insufficient to support any reasonable inference that this 'sham' reason [that no appropriate long-term, light duty work was available and it was not possible to reassign the pregnant CNA's lifting duties to other CNAs for the five or six months remaining in the plaintiff's pregnancy] was a pretext for sex discrimination." *Ekumah v. Greenery Group, Inc.*, 58 FEP Cases 1045, 1992 WL 78793 at \*2 (D. Mass. 1992). It is evidence of intentional discrimination *due to pregnancy* that is required. Such evidence is lacking in this record. Accordingly, I conclude that summary judgment for the defendant on both counts of the complaint is appropriate.

#### **V. The Motion to Strike Damages Claims**

The defendant has moved to strike the plaintiff's claims, raised in her complaint, for compensatory and punitive damages, based on the plaintiff's statement at her deposition that she was seeking only back pay and reinstatement, and her counsel's statement at that time that she was also seeking attorney fees, and on the alleged statement by her counsel to counsel for the defendant that the plaintiff "was not seeking front pay or damages for emotional distress." Affidavit of Melinda J. Catherine, Esq., attached to Defendant's Reply Brief in Support of Motion for Summary Judgment (Docket No. 33), ¶ 2. The plaintiff responds that her deposition testimony cannot be considered a waiver; her counsel has submitted an affidavit in which he states that the only time he proposed a

waiver of any of his client's claims was in a letter conveying a settlement proposal, thus denying by inference the sworn statement of defendant's counsel. Affidavit of Ronald R. Coles (Docket No. 40) ¶ 6. If the court adopts my recommendation that the defendant's motion for summary judgment be granted, this motion will be moot. While the motion raises serious issues concerning attorney conduct, I will not address it further here.

### **V. Conclusion**

For the foregoing reasons, the plaintiff's motion to amend the complaint is **DENIED**; and I recommend that the defendant's motion for summary judgment be **GRANTED**. No action is taken at this time on the defendant's motion to strike certain damages claims and no action is taken on the plaintiff's motion to strike portions of the Johnston affidavit. The defendant's motion to strike paragraph 31 of the plaintiff's affidavit dated April 15, 1997 is **GRANTED** as to the first sentence of that paragraph and otherwise **DENIED**. The defendant's motion to strike the affidavit of Ms. Brown is **GRANTED**. The defendant's motion to strike the affidavit of Dr. Morris is **DENIED** as to the factual statements in that affidavit, and no action is taken on the motion as to the statements of opinion in that affidavit.

### **NOTICE**

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

*Dated at Portland, Maine this 18th day of July, 1997.*

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*David M. Cohen  
United States Magistrate Judge*