

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JEANNIE FARRINGTON,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Civil No. 97-104-P-H
)	
OLSTEN CORPORATION,)	
)	
<i>Defendant</i>)	

**RECOMMENDED DECISION ON
DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

The plaintiff seeks relief under the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101 *et seq.*, and the employment discrimination provisions of the Maine Human Rights Act, 5 M.R.S.A. § 4572, against an employment agency that did not offer her an advertised job as a shoe factory worker. According to the plaintiff, she suffered illegal discrimination because the defendant based its decision on the fact that she suffers from a speech impediment that makes her seem as if she is mentally retarded. Having removed the action to federal court, the defendant now seeks summary judgment. I recommend that the defendant’s motion be granted.

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).

The Local Rules of this court impose certain procedural obligations on parties seeking or opposing summary judgment. Local Rule 7 describes motion practice in general, requiring the movant to provide a written memorandum of law. Loc. R. 7(a). “Affidavits and other documents setting forth or evidencing facts on which the motion is based shall be filed with the motion.” *Id.* Thereafter, to avoid waiving opposition to the motion, an opposing party must file a written objection, including a memorandum of law, with “citations and supporting authorities and affidavits and other documents setting forth or evidencing facts on which the objection is based.” *Id.* at (b). Finally, the movant may submit a reply memorandum within five days of the objection, which must

be “strictly confined to replying to new matter raised in the objection or opposing memorandum.” *Id.* at (c). Local Rule 56 sets out certain additional obligations specific to summary judgment motions. Each party must submit a “separate, short and concise statement of material facts.” Loc.R. 56. This is the opportunity for the movant to describe the facts as to which it is contended there are no genuine issues requiring a trial, whereas the opponent’s Local Rule 56 factual statement is expected to set forth facts that are genuinely in dispute. *Id.* Local Rule 56 includes an explicit warning to non-movants: “All material facts set forth in the statement required to be served by the moving party, if supported by appropriate record citations, will be deemed to be admitted unless properly controverted by the statement to be served by the opposing party.” *Id.*

The motion has been fully briefed according to the regime set out in Local Rule 7 and both parties have submitted Local Rule 56 factual statements. *See* Defendant’s Statement of Material Facts in Support of Defendant’s Motion for Summary Judgment (“Defendant’s SMF”) (Docket No. 12); Plaintiff’s Statement of Material Facts (“Plaintiff’s SMF”) (Docket No. 16). However, the plaintiff has submitted certain materials in addition to those permitted under the Local Rules. Specifically, she has filed a “Response to Defendant’s Statement of Material Facts” (“Response”) (Docket No. 15) with her opposition to the summary judgment motion and, two days after the defendant’s reply memorandum, a “Further Response to the Defendant’s Statement of Facts” (“Further Response”) (Docket No. 21) with an accompanying Affidavit of Shari Williams (“Williams Aff.”) (Docket No. 22). The defendant objects vigorously to this deviation from local practice. According to the defendant, by filing the Response the plaintiff has waived her right to controvert the assertions in the Defendant’s SMF. The defendant has also moved to strike the Further Response and accompanying affidavit.

The requirements contained in Local Rule 56 were imposed not to create traps for the procedurally unwary but in response to the First Circuit’s expressed concern about the difficulty of “ferreting out genuine factual disputes from a sprawling record.” *Pew v. Scopino*, 161 F.R.D. 1, 1 (D.Me. 1995) (citing *Stepanischen v. Merchants Despatch Trans. Corp.*, 722 F.2d 922, 930-32 (1st Cir. 1993)). “A trial judge cannot comb through every deposition, affidavit, pleading, and interrogatory answer in search of disputed factual issues.” *Pew*, 161 F.R.D. at 1. Therefore, “[t]he parties are bound by their [Local Rule 56 factual statements] and cannot challenge the court’s summary judgment decision based on facts not properly presented therein.” *Id.* The rule, its logic and its result here could not be more clear. Any factual assertions outside the four corners of the parties’ Local Rule 56 factual statements, including those set forth in the parties’ legal memoranda¹ and the plaintiff’s Further Response, are not considered.² The defendant’s motion to strike the Further Response and Williams Affidavit must be granted.

In opposing the motion to strike, the plaintiff takes two distinct positions. First, she invokes the “excusable neglect” standard set forth in Fed. R. Civ. P. 6(b)(2) for an enlargement of time following the expiration of the specified deadline. Second, the plaintiff suggests that she need not show excusable neglect in order to file the challenged materials because Local Rule 7 does not preclude her from supplementing her opposition to the summary judgment motion, whereas Fed. R. Civ. P. 56(c) explicitly permits her to “serve opposing affidavits” at any time “prior to the day of

¹ Both the defendant’s memorandum of law in support of its motion and the plaintiff’s memorandum in opposition to the motion contain numerous factual assertions, although those in the former are almost entirely confined to facts cited in the Defendant’s SMF.

² For this reason, it is not necessary to consider certain evidentiary issues raised by the defendant in its reply memorandum. To the extent the evidence challenged by the defendant is properly invoked by the plaintiff, it is not relevant.

hearing.”

I discern no excusable neglect. Counsel for the plaintiff refers to vacations, and various obligations concerning cases pending in state court, to account for why this case did not receive exhaustive attention from him in August and early September. However, as the plaintiff notes, these circumstances are what prompted the court to grant, without objection from the defendant, two separate motions for extension of the time for opposing the summary judgment motion — giving the plaintiff an additional 16 days altogether. The plaintiff further avers that it was only by reading on August 25th an affidavit, submitted with the summary judgment motion on July 30, that her attorney realized it would be useful to speak with Shari Williams,³ and that efforts to contact Williams were unsuccessful until a paralegal reached her on September 5. Counsel for the plaintiff is affiliated with a law firm with nine attorneys and, given the reference to a paralegal, some modicum of support staff assistance as well. Even taking into account understandable August vacation schedules and the vicissitudes of a busy litigation practice, the court is without a reasonable explanation for why no

³ The information at issue appears in the Affidavit of Joyce Tremblay (“Tremblay Aff.”) (Docket No. 11). Tremblay is the employee of the defendant with whom the plaintiff spoke during the incident at the heart of this lawsuit, which took place at the defendant’s Lewiston, Maine office on March 13, 1995. *Id.* at ¶¶ 5, 8. According to Tremblay, the plaintiff inquired about jobs for “packers” at a particular shoe factory. *Id.* at ¶ 8. Tremblay further avers that, as of March 13, her office only had one such available position at the factory, which was filled on that date by Shari Williams. *Id.* at ¶¶ 11-12. According to Tremblay, she does not know whether Williams took the position before or after the plaintiff’s visit, but was “positive” at the time she spoke with the plaintiff that the last open position had been filled. *Id.* at ¶ 12-13.

The plaintiff accuses Tremblay of “an outright lie.” Further Response at ¶ 12. In support of that position, she offers the Williams Affidavit, in which Williams states that she arrived at the defendant’s Lewiston office between 10:00 and 11:00 a.m. on March 13, 1995, took a dexterity test and was told by the interviewer only that she was “pretty sure” to be offered a job at the shoe factory. Williams Aff. at 1. According to Williams, the interviewer called her later in the day to tell her to report for an interview at the factory on March 14, 1995; it was only after this second interview that Williams was offered the position — fully a day after the plaintiff’s job inquiry. *Id.*

knowledgeable person at a law firm of that size reviewed and assessed the import of the Tremblay Affidavit for nearly a month. Nor does the plaintiff explain what prevented her from informing the court, after August 25 but before the filing of her opposition to the summary judgment motion, that efforts to obtain a sworn statement from an important witness were ongoing but still unsuccessful. Finally, the time to raise the possibility of excusable neglect would have been the point at which the plaintiff filed the Further Response and the Williams Affidavit. Invoking the excusable neglect standard only in response to the defendant's motion to strike these filings is an especially unpersuasive posture.

The plaintiff has a fallback position, at least as to the Williams Affidavit, which is articulated in her opposition to the motion to strike. According to the plaintiff, the Williams affidavit is timely because nothing in the Local Rules precludes such a filing and because of the language from Fed. R. Civ. P. 56, quoted above, concerning the time for filing opposing affidavits. I am unable to agree with the plaintiff that the language in Rule 56(c), which pegs the time for opposing a summary judgment to the hearing on the motion, affords her a safe harbor for adding affidavits to the summary judgment record after the motion is fully briefed. The references to a "hearing" in Rule 56(c) are admittedly confusing, because the court is not required to hear oral argument prior to deciding a summary judgment motion. *Delgado-Biaggi v. Air Transp. Local 501*, 112 F.3d 565, 567 n.4 (1st Cir. 1997); *see also* 10A C.Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2719 at 1 (Supp. 1997) (referring to "awkward" drafting of Rule 56(c)) (citation omitted). What is clear, however, is that "the purpose of Rule 56(c) is to allow a party to have a meaningful opportunity to challenge a summary judgment motion," a purpose that is achieved by giving an opposing party at least ten days to marshal an opposition to the motion. *Delgado-Biaggi*, 112 F.3d at 567 (citations

and internal quotation marks omitted). Consistent with the orderly administration of justice, ten days is precisely the period granted by the Local Rules of this court to parties opposing summary judgment motions. Absent a showing of excusable neglect, or some other compelling reason, the applicable rules and basic notions of fairness preclude the filing of post-opposition affidavits by the non-moving party.

Finally, the defendant objects to consideration of the so-called “video affidavit” of the plaintiff. The plaintiff has appended a videocassette copy of this “affidavit” to her memorandum of law, and a transcript — denominated “Videotaped Interrogation Under Oath of Jeannie Farrington” — is likewise appended to the memorandum. Although the particular forms of evidence listed in Fed. R. Civ. P. 56 as properly considered in summary judgment proceedings are non-exhaustive and, indeed, “[t]he court may consider any material that would be admissible or usable at trial,” Wright, Miller & Kane, *supra*, § 2721 at 40 (2d ed. 1983), I agree with the defendant that an affidavit is self-evidently a written statement to which the affiant has made oath or otherwise verified, and that it would therefore be improper to treat a videotape as an affidavit. However, given that the plaintiff made oath to the statements contained in the video affidavit, I see no reason why the court should not treat the *transcript* as the equivalent of an affidavit. *See, e.g., Duffee v. Murray Ohio Mfg. Co.*, 160 F.R.D. 602, 603-04 (D.Kan. 1995) (sworn statement, taken and transcribed by reporter after opposing party canceled deposition, admissible in summary judgment proceeding as affidavit). I therefore consider only the transcribed version of the “video affidavit” in evaluating the summary judgment motion.

II. Factual Context

In light of the foregoing rulings on evidentiary issues, and drawing all reasonable inferences in favor of the plaintiff, the summary judgment record reveals the following: The defendant owns Olsten Staffing Services, a company with an office in Lewiston that places candidates for temporary and/or permanent employment with third-party companies.⁴ Tremblay Aff. at ¶¶ 3-5. In 1989 the plaintiff applied for a placement through the defendant, but no employment resulted because the defendant received a reference from an unspecified person indicating that the plaintiff was “not dependable.” *Id.* at ¶ 6. According to the defendant’s written records, the defendant’s interviewer indicated in 1989 that the plaintiff’s speech was “somewhat distorted.” *Id.* The plaintiff functions at the borderline intellectual level. Affidavit of George Sheckart, appended to Plaintiff’s Memorandum, at 1. The “perceived difference” in her speech, which can make her difficult to understand, is the result of “articulation errors” rather than her intellectual functioning. Deposition of George R. Sheckart, Ph.D. at 25 and Exh. 2 thereto at 4.⁵

Theresa Landry is the plaintiff’s daughter. Deposition of Theresa Landry (“Landry Dep.”) at 4. On Friday, March 10, 1995, Landry went to the defendant’s Lewiston office in response to a

⁴ Accordingly, I treat the defendant and Olsten Staffing Services as interchangeable for purposes of the summary judgment motion and refer to them collectively as “the defendant.”

⁵ Sheckart is the plaintiff’s expert. The defendant objects to consideration of his affidavit on the ground that Sheckart is not qualified to proffer the expert opinions stated therein. The court need not resolve the issue, since this is the only aspect of Sheckart’s opinions that is cited in either party’s Local Rule 56 factual statement, and there appears to be no genuine issue of material fact concerning the plaintiff’s contention that any speech difficulties she has are not the result of mental retardation.

newspaper ad for clerical and data entry positions. *Id.* at 10-11.⁶ After undergoing “all kinds of tests,” Landry was told that no office jobs were available because they “go fast.” *Id.* at 11, 13. The person who interviewed Landry told her that she could have a job packing and inspecting shoes, but Landry indicated that she did not desire such a position. *Id.* at 13. Instead, Landry told her mother that shoe factory jobs were available and suggested the plaintiff visit the defendant’s Lewiston office. *Id.* at 16. On Sunday, March 12, 1995, the plaintiff saw a newspaper advertisement indicating that the defendant had openings available for inspectors and packers. Deposition of Jeannie D. Farrington (“Farrington Dep.”) at 33. On the following two days — Monday, March 13 and Tuesday, March 14, 1995 — the defendant published advertisements that were either identical or substantially similar to the one that ran on March 13. Deposition of Joyce Tremblay (“Tremblay Dep.”) at 24. As a frequent advertiser in various newspapers that serve the Lewiston area, the defendant is required to finalize its ads in advance of the day on which they appear. Tremblay Aff. at ¶ 19. In March 1995 it was the defendant’s practice to place advertisements for three consecutive days. *Id.*

On Monday, March 13, soon after the defendant’s Lewiston office opened at 7:30 a.m., the plaintiff arrived at the office. [Transcript of] Videotaped Interrogation Under Oath of Jeannie Farrington (“Farrington Video Tr.”), appended to Plaintiff’s Memorandum Responding to Defendant’s Motion for Summary Judgment (Docket No. 17), at 8. The plaintiff asked whether the defendant had any jobs available for “packers,” and was told by Tremblay, then the customer service

⁶ Landry’s testimony was that she made this visit in “March or April” of 1995, but that she did not remember the exact date. Landry Dep. at 10. However, she testified that this visit occurred on the working day immediately preceding the plaintiff’s visit to the defendant’s office. *Id.* at 16. The parties are in agreement that the plaintiff’s visit took place on Monday, March 13, 1995.

manager in the Lewiston office, that no such jobs were available. Farrington Dep. at 35; Tremblay Aff. at ¶ 5.⁷ The plaintiff responded, “Oh[,] I talked to my daughter, and she told me you were hiring.” Farrington Dep. at 35. That marked the end of the discussion and, disappointed, the plaintiff left. *Id.* Neither Tremblay nor anyone else in the office had asked the plaintiff to leave. Tremblay Aff. at ¶ 9. She did so without asking for an application or an interview. *Id.* She did not inquire about any jobs other than that of “packer at Acorn.” *Id.* The entire encounter took approximately two minutes. Farrington Dep. at 36.

Tremblay considered the plaintiff’s attitude to have been “abrupt, hostile and abrasive.” Tremblay Aff. at ¶ 16. At the time of their 1995 encounter, Tremblay remembered the plaintiff from her 1989 visit to the office because she recalled that the plaintiff had a speech impediment. Affidavit of Brenda E. Maliska, appended to Plaintiff’s Memorandum, at 1.⁸ The defendant’s usual job placement process involves a detailed interview, filling out a detailed application and, in some cases, testing. Tremblay Aff. at ¶ 7.

The jobs of “inspector” and “packer” are both unskilled positions and were treated as interchangeable by the defendant. *Id.* at ¶ 10. The plaintiff had prior experience as a packer in a shoe factory. Video Tr. at 5. At the end of the day on Friday, March 10, 1995 — and, thus, on the morning of Monday, March 13, 1995 — the defendant had one unfilled “packer/inspector” position

⁷ The plaintiff refers to the person with whom she spoke as simply “a girl,” but the parties are in agreement that the plaintiff spoke with Tremblay.

⁸ Maliska is the Maine Human Rights Commission investigator who wrote the commission report to which the defendant objects as not properly a part of the summary judgment record. The defendant does not object to the inclusion of her affidavit, as distinct from her report. Nor does the defendant object on hearsay grounds to the court’s consideration of the statements made by Tremblay to Maliska. It would appear that these statements are admissible as admissions within the meaning of Fed.R.Evid. 801(d)(2)(D).

available. Tremblay Aff. at ¶ 11. This job was given to Shari Williams on March 13.⁹ *Id.* at ¶ 12.

Immediately after her encounter with Tremblay at the defendant's Lewiston office, the plaintiff consulted her attorney. Farrington Dep. at 37. He wrote the defendant a letter seeking an explanation for its refusal to hire the plaintiff. Tremblay Aff. at ¶ 21. On May 8, 1995 Attorney Kevin Marrazzo responded on behalf of the defendant. *Id.* and Exh. 8 to Tremblay Dep. Thereafter, the plaintiff filed a complaint, alleging disability discrimination, with the Maine Human Rights Commission. Amended Complaint at ¶ 10; Defendant's SMF at ¶ 21. In connection with the commission's investigation, Marrazzo and another employee of the defendant, Claudia Rose, wrote a series of letters providing the defendant's position relative to the plaintiff's allegations.¹⁰ The

⁹ According to Tremblay, at the time she spoke with the plaintiff on March 13, 1995, she was "positive that the last open packer/inspector position had been filled." Tremblay Aff. at ¶ 13. However, given the plaintiff's sworn assertion that she arrived at the defendant's office immediately after it opened on Monday morning, in light of Tremblay's deposition testimony that she did not remember the time on March 13 that Williams came to the office, Tremblay Dep. at 49-50, and given that Williams was offered the available job at some unspecified time on that date, it would be inconsistent with a plaintiff-favorable view of the record to credit Tremblay's assertion concerning what she knew about the available job at the time of the plaintiff's visit.

¹⁰ These letters appear in the record as Exhibits 9-11 to the Tremblay Deposition. A final letter, written to the Equal Employment Opportunity Commission following the close of the Maine Human Rights Commission investigation, appears as Exhibit D to the Tremblay Affidavit. In its opposition to the defendant's motion, the plaintiff makes much of what she characterizes as inconsistencies in the defendants' explanations as revealed by these letters and Tremblay's deposition testimony. In the defendant's initial letter to the plaintiff's attorney, which appears as Exhibit 8 to the Tremblay deposition, its counsel refers both to the plaintiff's "abrupt and hostile manner" as well as information the defendant received in 1989 suggesting that the plaintiff was not dependable. At her deposition, Tremblay flatly denied that dependability was a factor in her decision. Tremblay Dep. at 66. Tremblay also testified that the plaintiff's "tone of voice" was "abrupt" and reflected "abrasiveness" "from the moment she came in the door." *Id.* at 40. According to the plaintiff, this letter marked the first time that the defendant or any of its agents took the position that her demeanor was inappropriate before being told that no jobs were available.

None of the evidence related to these alleged inconsistencies is referenced in the Plaintiff's Local Rule 56 factual statement, and so it is not properly part of the summary judgment record.

commission ultimately determined that reasonable grounds existed to believe that the plaintiff had suffered illegal discrimination based on a perceived disability.¹¹

III. Legal Analysis

“[I]nterpretation of the ADA and of the Maine Human Rights Act have proceeded hand in hand,” with the former providing “guidance” to Maine courts in the application of the latter. *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 14 (1st Cir. 1997) (citing *Winston v. Maine Technical College Sys.*, 631 A.2d 70, 74 (Me. 1993)). The plaintiff does not dispute the defendant’s assertion that the court’s analysis of her ADA claim will be dispositive of her state-law cause of action. Accordingly, I discuss only the ADA claim.

The expressed purpose of the ADA is “the elimination of discrimination against individuals with disabilities.” 42 U.S.C. § 12101. To that end, with certain exceptions not applicable here, an employer may not discriminate “against a qualified individual with a disability because of the disability of such individual” in the areas of, *inter alia*, job application procedures and hiring. *Katz v. City Metal Co.*, 87 F.3d 26, 30 (1st Cir. 1996); 42 U.S.C. § 12112(a).

To obtain relief under the Act, a plaintiff must prove three things. First, that [s]he was disabled within the meaning of the Act. Second, that with or without reasonable accommodation [s]he was able to perform the essential functions of [her] job. And third, that the employer [took the adverse employment action] in whole or in part because of [her] disability.

Katz, 87 F.3d at 30. In the ADA context, “disability” as applied to an individual plaintiff is defined as “(A) a physical or mental impairment that substantially limits one or more of the major life

¹¹ In so asserting, the plaintiff cites to nothing in the record that verifies this determination. It does not appear to be in dispute that the Maine Human Rights Commission so concluded.

activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” 42 U.S.C. § 12102(2). The plaintiff here relies on the “regarded as” prong of the definition.

A plaintiff may recover under the ADA for illegal disability discrimination by offering indirect proof of the discrimination. *Katz*, 87 F.3d at 30 n.2. In such an instance, the court applies the burden-shifting paradigm that originated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and that was refined most recently by the Supreme Court in *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502 (1993). *Id.* The parties agree that the *McDonnell Douglas* framework, originally used to evaluate claims of unlawful race discrimination under Title VII, governs here. Briefly summarized, the framework first requires the plaintiff to establish a prima facie case of discrimination, in which instance discrimination is presumed and the burden shifts to the defendant to produce evidence from which the factfinder could conclude that the adverse employment decision was made for a legitimate, nondiscriminatory reason. *Hicks*, 509 U.S. at 506-07 (citations and internal quotation marks omitted). If the defendant meets this burden of production, the presumption of discrimination “simply drops out of the picture” and the trier of fact decides the ultimate question of whether the plaintiff has proven the existence of intentional discrimination. *Id.* at 510-11.

The defendant first contends it is entitled to summary judgment because a critical element of the plaintiff’s prima facie case is lacking. Specifically, the defendant asserts a lack of evidence from which the factfinder could conclude that the plaintiff was “regarded as” having a disability within the meaning of the ADA, i.e., physical or mental impairment that substantially limits one or more of the plaintiff’s major life activities as set forth in section 12102(2). As the defendant notes, the relevant inquiry is not whether people in general regarded the plaintiff as having a disability, but

whether the defendant so regarded her at the time of the adverse employment decision. *See, e.g., Runnebaum v. NationsBank of Maryland, N.A.*, 123 F.3d 156, 174 (4th Cir. 1997) (en banc); *Harrington v. Rice Lake Weighing Sys., Inc.*, 122 F.3d 456, 460 (7th Cir. 1997); *Burch v. Coca-Cola Co.*, 119 F.3d 305, 322 (5th Cir. 1997); *Webb v. Mercy Hosp.*, 102 F.3d 958, 960 (8th Cir. 1996); *see also Cook v. State of Rhode Island, Dept. of Mental Health, Retardation & Hosps.*, 10 F.3d 17, 25 (1st Cir. 1993) (construing analogous provision of Rehabilitation Act). As the plaintiff points out, it would be inappropriate for the court simply to credit Tremblay's self-serving assertion that she had no such perception. But this begs the question of whether the plaintiff can sustain her affirmative burden as to this aspect of her prima facie case.

I conclude that she can. In its regulations implementing the ADA, the Equal Employment Opportunity Commission defines speaking as one of the "Major Life Activities," the impairment of which constitutes a disability within the meaning of the Act. 29 C.F.R. § 1630.2(i). The record here establishes that when the plaintiff had her brief encounter with Tremblay at the Lewiston office in 1995, Tremblay specifically remembered her as a person with a speech impediment. The employer's awareness of such a condition is sufficient to sustain the plaintiff's burden at the summary judgment stage of proving that the defendant regarded her as disabled. *See Katz*, 87 F.3d at 32-33 (employer knew defendant had heart condition and had observed his inability to climb stairs because of fatigue).

The defendant next contends that summary judgment is appropriate because, it having articulated a legitimate, non-discriminatory reason for its decision not to offer a placement to the plaintiff, she is unable to carry her ultimate burden of proving that the explanation was a pretext for discrimination. "[T]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Hicks*, 509 U.S. at 507

(citation and internal quotation marks omitted). Therefore, to survive a summary judgment motion at this final stage of the *McDonnell Douglas* analysis, the defendant must “adduce sufficient evidence to support a finding that [the defendant’s] stated reason was not only a pretext, but that it was a pretext for illegal [disability] discrimination.” *Smith v. Stratus Computer, Inc.*, 40 F.3d 11, 16 (1st Cir. 1994).

Hicks, and a series of subsequent First Circuit cases, take up the question of what constitutes sufficient evidence of pretext. At trial,

[t]he factfinder’s disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant’s proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination.

Hicks, 509 U.S. at 511 (emphasis in original). Accordingly, rejection of the defendant’s proffered reason for the employment decision does not compel a finding of discrimination. *Id.* However, as the First Circuit has made clear, this does not automatically preclude summary judgment for a defendant facing a discrimination claim on the theory that a factfinder could always find the proffered reason pretextual based purely on the evidence supporting the plaintiff’s prima facie case. *Smith*, 40 F.3d at 16 (quoting *Woods v. Friction Materials, Inc.*, 30 F.3d 255, 261 n.3 (1st Cir. 1994)); *see also DeNovellis v. Shalala*, 1997 WL 527912 at *5, *8 (1st Cir. Sept. 2, 1997) (although courts should “use restraint” in granting summary judgment when discriminatory animus at issue, summary judgment appropriate when record lacks evidence of “discriminatory taint, either directly or by inference”). Rather, “[t]he strength of the prima facie case and the significance of the disbelieved pretext will vary from case to case depending on the circumstances. In short, everything depends on the individual facts.” *Smith*, 40 F.3d at 16 (quoting *Woods*, 30 F.3d at 261 n.3). In some

cases, “[e]ssentially the same evidence” that supported the prima facie case would allow a reasonable jury to make the ultimate finding of pretext. *Molloy v. Blanchard*, 115 F.3d 86, 92 (1st Cir. 1997) (citing *Udo v. Tomes*, 54 F.3d 9, 13 (1st Cir. 1995)).

This is not such a case. No reasonable jury could conclude that unlawful disability discrimination occurred simply because Tremblay perceived the plaintiff to have a problem with her speech, declined to consider the plaintiff for the requested job placement, and then offered the available job to another person whom she did not perceive as having a speech problem. Unlike in *Molloy*, the reasons supplied by the defendant for its decision are not “so flimsy as to permit a finding of mendacity.”¹² *Molloy*, 115 F.3d at 92. Nor does the plaintiff’s prima facie case include evidence that Tremblay’s treatment of her deviated from a consistent pattern of employment decisions in a manner that would suggest that disability was the dispositive factor. *See id.* (male officers who had committed similar or more serious offenses than female plaintiff not disciplined as plaintiff was).

Moreover, given that the prima facie case itself is not sufficient to sustain the plaintiff’s burden, the summary judgment inquiry quickly reaches its end-point. The only additional evidence to which the plaintiff points concerns Tremblay’s insistence that she was positive when she spoke

¹² I make this determination notwithstanding the plaintiff’s contention that the defendant’s articulated reasons for its decision are suspect because they have shifted. For the reasons previously noted, the evidence supporting this contention is not properly part of the summary judgment record. Even if it were, I do not find the explanations to be inconsistent. Indeed, for all that appears, the defendant has always relied on Tremblay’s assertion that the plaintiff’s demeanor (as distinct from the quality of her speech) was inappropriate during the plaintiff’s brief visit to the defendant’s Lewiston office, notwithstanding the other theory (unreliability) advanced at one point by its counsel. The other alleged inconsistencies cited by the plaintiff — that the defendant at various points has alleged that her body language and tone of voice were inappropriate, that the plaintiff left the office too abruptly, and that the job the plaintiff sought was no longer available — are not themselves inconsistent with the poor-demeanor explanation.

with the plaintiff that the available job had been filled, versus evidence suggesting that Williams was not offered the job until after the plaintiff's office visit. For the reasons already discussed, the evidence of the timing of the Williams job offer is not of record. Even if it were, the most it would suggest is that a factfinder could dismiss as pretextual an explanation that the job was already filled. *See, e.g., Hidalgo v. Overseas Condado Ins. Agencies, Inc.*, 120 F.3d 328, 337 (1st Cir. 1997) (age discrimination case). Particularly given that the explanation the defendant seeks to rely on here is not that one, the uncertainty about whether Tremblay reasonably believed no job opening existed is not the least bit probative of discriminatory animus. In short, and notwithstanding the plaintiff's having met her prima facie burden, the record is devoid of additional evidence from which a factfinder could rationally conclude that the defendant used its articulated reasons as a pretext for discriminating against the plaintiff because it perceived her as having a disability.

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion for summary judgment be **GRANTED**.

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 this 30th day of October, 1997.

David M. Cohen
United States Magistrate Judge