

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

MANUELLA DIONISIO REED,)	
)	
<i>Plaintiff</i>)	
)	
v.)	<i>Docket No. 98-450-P-H</i>
)	
LEPAGE BAKERIES, INC.,)	
)	
<i>Defendant</i>)	

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

The defendant, Lepage Bakeries, Inc., moves for summary judgment on the plaintiff’s claim that its termination of her employment violated the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101 *et seq.* I recommend that the court grant the motion in part and deny it in part.¹

I. Summary Judgment Standard

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

¹ The defendant has requested oral argument on this motion. Defendant Lepage Bakeries, Inc.’s Motion Requesting Oral Argument on Its Motion for Summary Judgment (Docket No. 13). I am satisfied that the written submissions of the parties adequately address the legal issues raised. Therefore, the motion for oral argument is denied.

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 that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). 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. 1995) (citing *Celotex*, 477 U.S. at 324); 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 Ass’n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

The following undisputed material facts are appropriately supported in the summary judgment record.² The defendant discharged the plaintiff on June 4, 1996 based on her behavior

² Both parties have submitted statements of material facts as required by this court’s Local Rule 56. Eleven paragraphs in Defendant Lepage Bakeries, Inc.’s Statement of Undisputed Material Facts (“Defendant’s SMF”) (Docket No. 12) and one in the Plaintiff’s Statement of Material Facts, etc. (“Plaintiff’s SMF”) (Docket No. 15) include citations to the unverified complaint. The complaint is not admissible evidence and is not an appropriate source of authority for purposes of summary judgment. Factual assertions in a statement of material facts supported only by a citation to the complaint cannot be considered. Further, the defendant has failed to respond to the Plaintiff’s SMF and therefore the assertions included therein, to the extent that they are supported by citations (continued...)

during a meeting on June 1, 1996 attended by the plaintiff, Cindi Callahan, a human resource representative, and Jerry Norton, production supervisor, which the vice-president for human resources, Anthony M. Nedik, found unacceptable, insubordinate and threatening. Letter dated June 4, 1996 from Anthony M. Nedik to Manuella Dionisio Reed (“Letter”), Exh. 2 to Deposition of Manuella Dionisio-Reed, Volume I, excerpts attached to Defendant’s SMF as Exh. 4 (“Plaintiff’s Dep. I”). The plaintiff suffers from bipolar disorder, Deposition of Willard A. Bredenberg, M.D. (“Bredenberg Dep.”), excerpts attached to Plaintiff’s SMF as Exh. 8, at 12; Deposition of Stuart I. Price, LCSW (“Price Dep.”), excerpts attached to Plaintiff’s SMF as Exh.7, at 14, as well as posttraumatic stress related to sexual abuse that took place when she was a child, Price Dep. at 14.³

On or about March 13, 1995 the plaintiff and a co-worker had a fight about the muffin bagger that involved the use of profanity. Plaintiff’s Dep. I at 28-29. The plaintiff was upset and crying and had to leave work. Deposition of Manuella Dionisio-Reed (Vol. I) (“Plaintiff’s Dep. IA”), excerpts

²(...continued)

to the record, are deemed to have been admitted. Local Rule 56(e). In addition, the plaintiff’s response to the Defendant’s SMF fails to comply with the local rule. First, it does not list by number many of the paragraphs included in the Defendant’s SMF, apparently intending the court to conclude that the plaintiff admits those assertions not listed; Local Rule 56(c) requires a party opposing summary judgment to make explicit which facts in the moving party’s statement of material facts are admitted. Next, the plaintiff’s response refers to the plaintiff’s own statement of material facts and the plaintiff’s memorandum of law as the record material supporting the plaintiff’s denial of certain facts. Neither document is the specific page or paragraph of record material contemplated by Local Rule 56(e). The court should not be required to search through two or three documents before finding the deposition, affidavit, interrogatory answer, or other document of evidentiary quality that provides the factual support for the denial. In addition, it should be obvious that factual assertions made in a memorandum of law and not in a statement of material facts will not be considered by the court.

³ The plaintiff also suffers from bulimia, an eating disorder, Bredenberg Dep. at 11-12, Price Dep. at 14, but there is no evidence in the summary judgment record to suggest that this condition, whether or not it could be considered a disability, had any relationship whatsoever to the events surrounding her discharge. Accordingly, I will not consider it further.

attached as Exh. 1 to Plaintiff's SMF as Exh. 1, at 31-32. She "ended up" in the hospital for "around five days" and went back to work gradually. *Id.* at 32. After this incident, the counselor whom the plaintiff was seeing at the time told her to ask the defendant for an accommodation, specifically, that she be allowed to walk away from situations in which she was losing control. *Id.* at 32-33. Upon her return to work, the plaintiff met with Elizabeth Fraize, who worked in the personnel office, and Michael Pelletier, the plant manager. Plaintiff's Dep. I at 34-35. Pelletier told the plaintiff that "if you do have difficulties, you can walk away." *Id.* at 34. The plaintiff offered to get a note from her therapist, but both Fraize and Pelletier told her that that would not be necessary, and Fraize told her that "they would give me the accommodation." *Id.* The plaintiff mentioned at this meeting that she had a mental illness. *Id.* at 40.

At a second meeting attended by Pelletier, the plaintiff, and Jerry Norton, a supervisor, the plaintiff said that she "needed an accommodation to walk away because I had difficulties dealing with certain situations," and Pelletier told Norton that the plaintiff would need to be able to walk away "when [she] got into certain situations," and that she could do so and get hold of Norton or Pelletier. *Id.* at 34, 38, 40.

On May 22, 1996 the plaintiff went on workers' compensation leave due to an injury to her forearm.⁴ On May 30, 1996 Cindi Callahan Haven called the plaintiff to offer her a position as a roll

⁴ The only authority cited by the parties for this fact is paragraphs 15-17 of the complaint, Defendant's SMF ¶¶ 33-34, and Deposition of Cindi Callahan Haven ("Haven Dep. P"), excerpts attached to Plaintiff's SMF as Exh. 3, Exh. 1, Plaintiff's SMF ¶ 23. The former is an inappropriate source for support of a motion for summary judgment and the latter, which for the most part is illegible, appears not to address the assertion at all. However, because the fact does not appear to be in dispute and is necessary background for the events that follow which are at the center of this lawsuit, I have included the assertion in this recitation of the facts, despite the lack of appropriate support for it in the summary judgment record.

sorter that had been approved by her physician. Haven Dep. P at 36-37 & Exh. 1 thereto. During this telephone conversation, the plaintiff agreed to meet with Haven at 12:30 on the following Saturday, one-half hour before her first shift in the roll-sorter position would begin. *Id.* at 37; Plaintiff's Dep. I at 52. The plaintiff also expressed her preference for work on an earlier shift during this telephone conversation. Plaintiff's Dep. IA at 57. The defendant requires all employees returning from workers' compensation leave to meet with Haven and a supervisor prior to their first shift to review the employee's work restrictions. Deposition of Cindi Callahan Haven ("Haven Dep. D"), excerpts attached to Defendant's SMF as Exh. 10, at 12, 15.

As the meeting began on Saturday, June 1, 1996 the plaintiff told Haven that she had talked to another worker who was willing to switch shifts with her and Haven responded that they were not there to discuss that, but rather the job that was available. Haven Dep. P at 49-50. The plaintiff repeatedly returned to this subject and Haven repeatedly refused to discuss it. Plaintiff's Dep. IA at 55-56. The conversation became heated, Norton told Haven and the plaintiff to calm down, and Haven then told the plaintiff that she would not be allowed to switch shifts. *Id.* at 55. The plaintiff then said, "Fuck this," and put her hand on the doorknob. *Id.* at 56. Haven said to the plaintiff, "[I]f you walk out the door, you won't be able to start work today." Haven Dep. D at 54.

The plaintiff then asked Haven if she was going to fire the plaintiff and Haven said "no." Plaintiff's Dep. IA at 56. The plaintiff then "lost it," went into a "blind rage," and said to Haven, "Fuck you." *Id.* at 56, 60. Haven, using the telephone in the room, called Anthony Nedik, the vice-president for human resources, and told him what had happened. Haven Dep. P at 53. Nedik told her to have the plaintiff escorted out of the building by Norton. *Id.* Norton and the plaintiff left the building. Plaintiff's Dep. IA at 71.

The plaintiff proceeded to Nedik's office, in a different building, where she told Nedik what had happened, stating that she had a mental illness that caused her to "explode" when she became angry and that she had tried to use her accommodation and "wasn't allowed to." *Id.* at 70, 72-75; Haven Dep. P at 53. After her conversation with Nedik, the plaintiff went to Haven's office and apologized to Haven. Haven Dep. P at 67. After meeting with the plaintiff again the following Monday, Nedik decided to terminate her employment. Deposition of Anthony Nedic [sic] ("Nedik Dep."), excerpts attached to Plaintiff's SMF as Exh. 4, at 39.

III. Discussion

The sole claim in the plaintiff's complaint is that the defendant violated the ADA by discharging her and intentionally discriminating against her. Complaint ¶42. The applicable statute provides:

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a). The term "discriminate" includes:

not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.

42 U.S.C. § 12112(b)(5)(A). "Qualified individual with a disability" is defined as follows:

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

42 U.S.C. § 12111(8). The ADA defines “reasonable accommodation” as follows:

The term “reasonable accommodation” may include —

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(9).

To establish a claim of disability discrimination under the ADA, a plaintiff must prove

[f]irst, 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 discharged [her] in whole or in part because of [her] disability.

Katz v. City Metal Co., 87 F.3d 26, 30 (1st Cir. 1996). A plaintiff may also prove her case indirectly by using the burden-shifting method established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); under this approach,

a plaintiff must first prove by a preponderance of the evidence that . . . she (i) has a disability within the meaning of the Act; (ii) is qualified to perform the essential functions of the job, with or without reasonable accommodations; (iii) was subject to an adverse employment action by a company subject to the Act; (iv) was replaced by a non-disabled person or was treated less favorably than non-disabled employees; and (v) suffered damages as a result.

Jacques v. Clean-Up Group, Inc., 96 F.3d 506, 511 (1st Cir. 1996).

A. Existence of a Disability

The defendant contends that the plaintiff is not disabled within the meaning of the ADA. The

ADA defines a 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.

42 U.S.C. § 12102(2). The plaintiff claims that her psychiatric impairments substantially limit her major life activities of interacting with others, sleeping and working. Plaintiff’s SMF ¶ 3. She relies only on her own testimony to support this claim.⁵ *Id.* The First Circuit has indicated that these are major life activities that may serve to establish the existence of a mental disability. *Criado v. IBM Corp.*, 145 F.3d 437, 442 (1st Cir. 1998).⁶ For purposes of the motion for summary judgment, the plaintiff does not contend that she had a record of an impairment or was regarded by the defendant as having an impairment.⁷

Under the relevant regulation, an individual faces a “substantial limitation” when she is

- (i) Unable to perform a major life activity that the average person in the general population can perform; or

⁵ None of the deposition testimony of her therapist which is cited in support of paragraph 3 in the plaintiff’s SMF actually supports a conclusion that she is substantially limited in any of the three listed activities.

⁶ The First Circuit has also indicated that inability to interact with others is too amorphous a concept to provide the basis for liability under the ADA, although it left open the possibility that “a more narrowly defined concept going to essential attributes of human communication” could be understood to be a major life activity. *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 15 (1st Cir. 1997).

⁷ The plaintiff relies heavily on a document not readily available to the court and of which she does not provide copies, the EEOC Enforcement Guidance on the Americans with Disability Act and Psychiatric Disabilities. Plaintiff’s Objection at 2-6. The First Circuit has noted that the EEOC Compliance Manual is “hardly binding” on the courts. *Soileau*, 105 F.3d at 15 n.2. There is nothing in the record in this case to suggest that the EEOC’s “Enforcement Guidance” should bear any more legal weight than its Compliance Manual.

(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). Major life activities are defined in the regulations as “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” 29 C.F.R. § 1630.2(i).

With respect to the major life activity of working —

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

29 C.F.R. § 1630.2(j)(3).

The defendant points out that the Supreme Court has expressed doubt about the validity of working as a major life activity, *Sutton v. United Air Lines, Inc.*, 119 S.Ct. 2139, 2151 (1999), and contends that the plaintiff may not rely on working as the major life activity allegedly limited by her psychiatric disability because she failed to allege such a limitation in her charge of discrimination, citing *Ciampa v. Runyon*, 6 A.D. Cases 1091, 1996 WL 146283 (D.Mass. Mar. 28, 1996).⁸ While the Supreme Court has expressed doubt, it has not invalidated the regulation at issue, and this court

⁸ The defendant miscites this case as 871 F.Supp. 1502, Reply at 4, making it somewhat of an adventure for the court to locate. In any event, in that unreported case raising claims under the Rehabilitation Act, the magistrate judge in Massachusetts held only that a claim that the plaintiff was handicapped by virtue of specific disabilities not mentioned in his administrative complaint had not been exhausted. *Ciampa*, 1996 WL 146283 at *7. It is unlikely that the holding could be stretched to support a finding that failure to mention a specific life activity as one of those significantly limited by a disability appropriately included in an administrative complaint constitutes failure to exhaust a claim, given the magistrate judge’s reliance upon case law requiring that the allegations in the federal civil action describe the same conduct and implicate the same individuals as the administrative complaint. *Id.*

accordingly may not disregard it. It is unnecessary to decide whether the plaintiff's reliance on working is procedurally barred because she has not submitted any evidence that her mental disabilities significantly restricted her ability to perform either a class of jobs or a broad range of jobs in various classes, as required by the regulatory definition. Therefore, any claimed limitation of the plaintiff's substantial life activity of working will not be considered further here.

The other two major life activities upon which the plaintiff relies are not mentioned in the regulation, but the regulation by its own terms is not exclusive, and the First Circuit, as noted, has indicated that sleeping and ability to interact with others may be substantial life activities for purposes of the ADA. Contrary to the defendant's argument, Reply at 1-2, the Supreme Court in *Sutton* did not reject the regulations at issue; it merely noted that it had no need in that case to decide what deference was due to any of the regulations interpreting the ADA that had been issued by the EEOC, 119 S.Ct. at 2145-46. *See generally Ridge v. Cape Elizabeth Sch. Dep't*, 77 F.Supp.2d 149, 162-63 (D. Me. 1999) (invoking regulations at issue three months after *Sutton*).

The evidence offered by the plaintiff concerning these two major life activities is contradicted in some respects by the testimony of her therapist, but that serves only to indicate that, in the material present in the summary judgment record, there is a dispute with respect to an issue of material fact. It is not a basis upon which summary judgment may be awarded to the defendant. The plaintiff's evidence, viewed in a manner favorable to her as it must be at this point, is sufficient to avoid the entry of summary judgment in favor of the defendant with respect to the question whether the plaintiff had a disability under the ADA at the time her employment was terminated by the defendant.

B. The Accommodation

The defendant next contends that the plaintiff's requested accommodation was unreasonable as a matter of law and, in the alternative, that it did not refuse to allow her to use the accommodation. Motion at 22-24. It is the plaintiff's burden to demonstrate that the requested accommodation was reasonable. *Feliciano v. State of Rhode Island*, 160 F.3d 780, 786 (1st Cir. 1998). Here, the defendant focuses on the plaintiff's deposition testimony acknowledging that she understood that the accommodation would allow her to decide "when not to listen to a supervisor." Deposition of Manuella Dionisio-Reed, November 17, 1999, excerpts attached to Defendant's SMF as Exh. 5, at 84. The case law cited by the defendant in support of its argument that such an accommodation would be unreasonable *per se* deals only with situations in which the plaintiff claimed entitlement to a transfer to another position, an element not present in either party's version of the claimed accommodation in this case. In addition, there is no suggestion in the summary judgment record that the plaintiff's possible entitlement to "not listen" to a supervisor was in any way implicated in the events involving Haven that led up to the termination of the plaintiff's employment.⁹ The summary

⁹ For this reason, the defendant's argument that, as a matter of law, it has met its burden to demonstrate that the requested accommodation would impose undue hardship on it, requiring the entry of summary judgment in its favor, must fail. First, it is not at all clear from the summary judgment record that the defendant, through its supervisory employees, ever agreed to an accommodation beyond allowing the plaintiff to walk away from stressful situations in which she feared losing control. Second, an accommodation allowing the plaintiff to decide not to listen to a supervisor was not implicated in the Haven meeting. Third, the cited testimony does not specify whether the plaintiff's understanding of this aspect of the accommodation was limited as to time. For example, an accommodation allowing an employee not to listen to a supervisor until she calmed down, provided that the employee returned within a few minutes to listen to the supervisor, would be quite different in effect, for purposes of evaluating hardship to the employer, from an accommodation that allowed the employee to refuse to listen to the supervisor at all, at any time. Finally, as noted above, such an accommodation is distinguishable from one allowing an employee to obtain a transfer to a position with a different supervisor whenever the employee finds difficulty (continued...)

judgment record demonstrates only that the plaintiff's alleged accommodation of being allowed to walk away from stressful situations in which she feels that she is about to lose control of her temper is an activity that the defendant's supervisory employees have recommended to other employees, at least when the situation involves coworkers. Deposition of Jerry Norton ("Norton Dep."), excerpts attached to Plaintiff's SMF as Exh. 5, at 27; Deposition of Michael Pelletier ("Pelletier Dep."), excerpts attached to Plaintiff's SMF as Exh. 6, at 42, 44. The defendant has not established that an accommodation allowing the plaintiff to walk away temporarily from a stressful situation involving her supervisor or a management employee who was not her supervisor would be unreasonable as a matter of law. *See generally Jacques*, 96 F.3d at 515 ("cases involving reasonable accommodation turn heavily upon their facts and an appraisal of the reasonableness of the parties' behavior").

The defendant argues that it did not refuse to provide the plaintiff with her accommodation during the meeting she attended with Haven and Norton because neither individual prohibited her from leaving the room. Motion at 23. The summary judgment record establishes that Haven told the plaintiff that she would not be fired and that she would not be working that day if she left the room.¹⁰ It also establishes that the plaintiff did not inform Haven and Norton that she wished to exercise her accommodation; that Norton, but not Haven, was aware that Pelletier, the plant manager, had told the plaintiff that she "was supposed to walk away" if she "ever got into a

⁹(...continued)
in dealing with her current supervisor.

¹⁰The summary judgment record does not provide any support for the defendant's argument, presented in its reply, that the plaintiff's exercise of her accommodation during her meeting with Haven and Norton would have been "problematic" due to the physical location of the room in which the meeting took place. Reply at 6 n.2. Such fact-based arguments require the presence in the summary judgment record of appropriately supported factual assertions in a party's statement of material facts or response to the opposing party's statement of material facts.

confrontation or an argument,” Norton Dep. at 26; and that the plaintiff felt that Norton and Haven were “not letting” her use her accommodation, Plaintiff’s Dep. IA at 62. Whether the plaintiff’s perception that she was not being allowed to use her accommodation under the circumstances was reasonable is a question requiring the evaluation of the credibility of the plaintiff, Haven and Norton, an exercise not to be performed by a court reviewing a motion for summary judgment. Again, viewing the summary judgment evidence in the light most favorable to the plaintiff, the defendant has not established that it is entitled to summary judgment on this basis.

C. Disparate Treatment

The defendant contends that the plaintiff cannot succeed as a matter of law in proving her claim under the burden-shifting approach because she cannot show that she was treated less favorably than non-disabled employees with respect to the conduct that led to her termination. Motion at 24-25. The letter informing the plaintiff of her termination states that her behavior in the meeting with Norton and Haven was “unacceptable,” that her actions were “insubordinate and threatening,” and that her words were “vulgar and offensive.” Letter. The plaintiff responds that there is no evidence that she threatened Haven, Opposition at 10-11, 13, and that the defendant had not disciplined any employees for “the type of behavior that allegedly formed the basis for Ms. Reed’s termination,” *id.* at 13.

However, the letter does not purport to terminate the plaintiff’s employment solely because she threatened Haven, nor because she used vulgar and offensive words. The incidents of allegedly similar behavior for which the defendant provided no discipline submitted by the plaintiff all involve

the use of profanity by employees in their contact with co-workers. Plaintiff's SMF ¶¶ 55-58.¹¹ The only evidence concerning the defendant's practices with respect to insubordination¹² offered by the plaintiff is that Nedik had not disciplined any employee for this reason in the three years preceding the events that gave rise to this action. Nedik Dep. at 22.¹³ She makes no showing that Nedik was the only management-level employee of the defendant who would impose discipline for insubordination. She does not suggest how many employees the defendant had at the relevant time.

The plaintiff has not submitted evidence that would allow a reasonable factfinder to conclude that she was treated less favorably than non-disabled employees with respect to the behavior upon which her dismissal was based. The defendant is accordingly entitled to summary judgment strictly limited to any attempt by the plaintiff to prove her claim under the burden-shifting approach based on allegations that she was treated less favorably than non-disabled employees.¹⁴

¹¹ The plaintiff's assertion that Nedik "had never disciplined an employee for engaging in an argument with . . . a supervisor," Plaintiff's SMF ¶ 58, has no value for this purpose because Nedik also testified that he was not aware of any arguments between employees and supervisors during the relevant period, Nedik Dep. at 21.

¹² The plaintiff also refers to the precipitating events as "an argument between two employees," Opposition at 12, apparently to suggest that her use of profanity directed at Haven was nothing more than her use of profanity, not directed at any particular individual, during heated discussions with her co-workers. To the contrary, even if the nature of the profanity had been the same, Haven cannot be considered as the equivalent of a production line worker for purposes of evaluation of the plaintiff's actions; some deference was clearly due her position from production workers.

¹³ Nedik also testified that he had imposed discipline for insubordination. *Id.*

¹⁴ The plaintiff discusses the defendant's alleged failure to resort to its customary progressive discipline procedures after her meeting with Haven and Norton as evidence that she was treated differently. Opposition at 12-14. In the absence of evidence that other employees who acted in a similar fashion were disciplined in accordance with such procedures, that argument carries no weight on this point. However, I emphasize that this conclusion does not mean that the plaintiff may not
(continued...)

D. Misconduct

The defendant's final argument is that the defendant was discharged for misconduct, not because she had a disability. Insubordination and "failure to get along with both co-workers and supervisors in a setting which requires cohesive teamwork is a justification for the firing" of an employee who makes a claim under the ADA. *Ridge*, 77 F.Supp.2d at 158. In response, the plaintiff argues that there is no evidence that the plaintiff posed a direct physical threat to Haven, that the defendant did not undertake a sufficient investigation before the plaintiff was fired, and that the case law upon which the defendant relies is distinguishable from her claim. Opposition at 9-11. The defendant contends that courts have "overwhelmingly" held that an employer need not tolerate misconduct, even when that misconduct is caused by a mental illness. Motion at 15.

The First Circuit has rejected the argument that conduct connected to a disability must always be considered to be action "because of" a disability and therefore protected by the ADA. *EEOC v. Amego, Inc.*, 110 F.3d 135, 149 (1st Cir. 1997). Here, as in *Amego*, there is no evidence that the plaintiff's disability compelled her to engage in the conduct that gave rise to her termination, *i.e.*, directing profanity at Haven. *Id.* However, the plaintiff's testimony can be interpreted to suggest that she would not have directed the profanity at Haven if she had been able to exercise her accommodation and walk away from Haven until she could control her anger. This aspect of the factual situation distinguishes this case from *Amego*.

The courts are not uniform in their treatment of this issue. In *Teahan v. Metro-North Commuter R. R. Co.*, 951 F.2d 511, 516-17 (2d Cir. 1991), in the context of assessing whether

¹⁴(...continued)
introduce such evidence at trial, if such evidence is otherwise admissible, in support of her effort to prove that she was fired due to her disability.

plaintiff was “otherwise qualified” for the position at issue, the Second Circuit held that misconduct that is causally related to a disability cannot be grounds for termination. In the majority of cases, courts have held that the Rehabilitation Act is not violated when the employee is fired due to egregious or criminal conduct which would result in termination if the employee were not disabled. *Newland v. Dalton*, 81 F.3d 904, 906 (9th Cir. 1996), and cases cited therein. Cases decided under the Rehabilitation Act have precedential value for ADA claims. *Tardie v. Rehabilitation Hosp. of Rhode Island*, 168 F.3d 538, 542 (1st Cir. 1999).

In *Hamilton v. Southwestern Bell Tel. Co.*, 136 F.3d 1047 (5th Cir. 1998), the male plaintiff

slamming an office door, angrily confronted a physically smaller female manager in front of witnesses after she returned to work from a shopping trip. In response to her appeal to not speak to her in such a tone, he slapped her hand down, yelling that she “get that f__ing finger out of my face.” Additional profanity followed. He stormed from the office but then returned to continue his abusive harangue, yelling “You f__ing bitch!”

Id. at 1052. The court upheld the employer’s dismissal of the plaintiff against a claim that the incident was caused by his post-traumatic stress disorder and thus violated the ADA, holding that “[a]n employee who is fired because of outbursts at work directed at fellow employees has no ADA claim.” *Id.* The court based this holding, at least in part, on the existence of a policy against workplace violence that had been promulgated by the employer before the plaintiff’s misconduct occurred. *Id.* See also *Carrozza v. Howard County, Maryland*, 847 F. Supp. 365, 367-68 (D.Md. 1994) (plaintiff’s loud, abusive and insubordinate behavior in workplace justified termination, even if it was caused by her bi-polar mental disorder; ADA claim).¹⁵

¹⁵ The plaintiff does not explain in her opposition to the motion for summary judgment how *Hamilton* and *Carrozza* may be distinguished from the instant case. She does not mention either case at all.

In this case, the defendant offers nothing in its statement of material facts to allow the court to conclude that it would have terminated any employee who behaved as the plaintiff did toward Haven. The court is not allowed to draw inferences in the moving party's favor when considering a motion for summary judgment. This omission, coupled with the lack of any evidence concerning the possibility that the defendant had a policy prohibiting such conduct by employees,¹⁶ leads me to the conclusion that the defendant is not entitled to summary judgment on the basis of the plaintiff's misconduct alone. *See Den Hartog v. Wasatch Academy*, 129 F.3d 1076, 1088 (10th Cir. 1997) (plaintiff claimed his child's bipolar affective disorder caused child to engage in behavior that was basis for employer's decision not to renew plaintiff's teaching contract; court held that employer must first consider whether mentally disabled employee's misconduct could be remedied through reasonable accommodation; if not, must tolerate "eccentric or unusual conduct" so long as employee satisfactorily performs job, unless employee poses direct threat to health or safety of other employees or conduct arises out of use of alcohol or drugs).

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion for summary judgment be **GRANTED** only as to any attempt by the plaintiff to prove that the defendant violated her rights under the ADA based on an allegation that she was treated differently from nondisabled employees and otherwise **DENIED**.

¹⁶ Nedik did testify that he based his decision to fire the plaintiff on, *inter alia*, "company policy," Nedik Dep. at 40, but this statement is not included in the defendant's statement of material facts and, in any event, does not convey what that policy was, how he found the policy to be violated, or whether the defendant had informed employees of the existence and content of the policy.

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 29th day of February, 2000.

*David M. Cohen
United States Magistrate Judge*