

**UNITED STATES DISTRICT COURT**

**DISTRICT OF MAINE**

<b>SHAWNEE PATTEN,</b>	)	
	)	
<b>Plaintiff</b>	)	
	)	
<b>v.</b>	)	<b>Docket No. 00-213-P-H</b>
	)	
<b>WAL-MART STORES EAST, INC.,</b>	)	
	)	
<b>Defendant</b>	)	

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

The defendant, Wal-Mart Stores East, Inc., moves for summary judgment on all claims raised by the plaintiff in this action alleging violation of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101 *et seq.*, and the Maine Human Rights Act (“MHRA”), 5 M.R.S.A. § 4551 *et seq.* In response to the motion, the defendant states that she “is no longer pursuing her claims that Defendant failed to offer Plaintiff a reasonable accommodation or for a hostile work environment based on disability,” Plaintiff’s Objection to Defendant’s Motion for Summary Judgment (“Plaintiff’s Memorandum”) (Docket No. 11) at 1 n.1, and I accordingly recommend that the court enter summary judgment for the defendant on those claims. With respect to the sole remaining claim that the defendant terminated the plaintiff’s employment due to disability, I recommend that the court grant the motion for summary judgment in part.

**I. Summary Judgment Standard**

Summary judgment is appropriate only if the record shows “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 over it 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 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 parties’ respective statements of material facts submitted pursuant to this court’s Local Rule 56.

The plaintiff was employed as an associate at the Wal-Mart store in Augusta, Maine from on or about September 30, 1997 to July 19, 1998. Defendant’s Statement of Material Facts as to Which There is No Genuine Issue to be Tried (“Defendant’s SMF”) (Docket No. 8) ¶ 1; Plaintiff’s Objection to Defendant’s Statement of Material Facts (“Plaintiff’s Responsive SMF”) (Docket No. 12) ¶ 1. The

plaintiff completed an employment application at Wal-Mart on September 30, 1997 on which she wrote: “I have muscular dystrophy but I’m a good worker and I really need this job.” *Id.* ¶ 3. During the interview/application process, the plaintiff told the assistant manager, Stephanie Gill, that she had muscular dystrophy, that she had a hard time walking long distances and lifting heavy objects, and that her speech was a problem. *Id.* ¶ 4. Also during this process, the plaintiff signed a document entitled “Wal-Mart Stores Matrix of Essential Job Functions,” which was intended to advise applicants who had disabilities of the essential functions of various positions as defined by the ADA. *Id.* ¶ 5. On this form, the sales floor position was highlighted and the line “Yes, I have the ability to perform all of the functions highlighted above” was checked. *Id.* The plaintiff also signed paperwork acknowledging the requirements that associates’ working hours must remain flexible and that full-time associates would work 28 or more hours per week. *Id.* ¶ 7.

The plaintiff was hired as a sales floor associate and worked in that position for two or three weeks, after which she advised Gill that she was having a hard time performing the work and requested a different position in the store. *Id.* ¶ 6. The plaintiff was transferred to a position as a cashier. *Id.* ¶¶ 6, 8. On January 30, 1998 she completed another document entitled “Wal-Mart Stores Matrix of Essential Job Functions” on which the cashier position was highlighted; she checked off the box next to the statement “Yes, I have the ability to perform all of the functions highlighted above.” *Id.* ¶ 8.

In October 1997 the plaintiff injured her back after stepping on a soda can and falling down in the Wal-Mart parking lot. *Id.* ¶ 9. After receiving medical treatment, she was released to work with restrictions which Wal-Mart accommodated by assigning her to sit at a table selling raffle tickets. *Id.* She was subsequently returned to the cashier position. *Id.* In January 1998 Gerald Tyler, the store manager, *id.* ¶ 49, approved the plaintiff’s request for a medical leave of absence related to a heart

condition, *id.* ¶ 11. The plaintiff was out of work for approximately two weeks in January 1998 as a result of this heart condition, which was not related to her muscular dystrophy. *Id.* ¶¶ 11-12. Tyler also approved the plaintiff's request for a leave of absence for surgery on her right foot beginning February 26, 1998 with an expected return date of six to eight weeks. *Id.* ¶¶ 13-14. The plaintiff was out of work on an unpaid leave of absence from February 26, 1998 until June 3, 1998. *Id.* ¶ 15.

On June 1, 1998 the plaintiff was seen by the physician who performed the foot surgery. *Id.* ¶ 16. She received a disability certificate that allowed her to return to work on light duty for four hours a day until June 10, 1998, then six hours a day until June 17, 1998 and then eight hours per day until June 24, 1998, following which she would be back to regular duty. *Id.* When the plaintiff returned to work on June 3, 1998 she wore a boot cast and requested that she be provided with a stool due to her standing restrictions. *Id.* ¶ 17. Before the end of the day, the plaintiff was transferred from a cashier position to a people greeter position in the Lawn and Garden Department. *Id.* She worked as a people greeter in this department from June 3, 1998 to June 27, 1998, at which time she was scheduled to return to work as a cashier. *Id.* ¶ 18. The surgeon issued a second disability certificate dated June 8, 1998 which stated that the plaintiff was to work four hours a day, standing only one of those hours "[f]or one month." *Id.* ¶ 19.

As of July 8, 1998 the plaintiff had returned to full duty without restrictions. *Id.* ¶ 20. She could perform her job as a cashier without accommodation. *Id.* She worked in this capacity from July 8 to July 19, 1998. *Id.* ¶ 21.

Before July 19, 1998 the plaintiff had spoken with Paula Carey, the assistant manager, on only one occasion. *Id.* ¶ 23. On July 17, 1998 the plaintiff called in sick. *Id.* ¶ 24. On Sunday, July 19, 1998, the plaintiff was scheduled to work from 11 a.m. to 3 p.m. *Id.* On that day, she worked from 8:40 a.m. until 10:17 a.m. and asked to go home early due to an earache and feelings of dizziness. *Id.*

She was sent to Carey's office, where her employment was terminated. *Id.* On the exit interview form, Carey listed the following explanation of termination: "Shawnee is consistently unable to come into work or when she comes in, she always needs to leave." *Id.* One of Carey's responsibilities as assistant manager was to oversee the cashiers. *Id.* ¶ 25.

As an assistant manager, Carey had authority to terminate an employee without the approval of the store manager. *Id.* ¶ 27. She does not recall having any specific conversations with Tyler about the plaintiff. *Id.* She was aware of the fact that the plaintiff had been on a leave of absence for her foot and remembers seeing the plaintiff wearing a boot cast. *Id.* ¶ 28. According to Carey, the plaintiff had "attendance issues" over a period of two to three weeks before July 19, 1998 when Carey decided to terminate her employment. *Id.* ¶ 29. Carey reviewed time sheets and attendance records on a daily basis and knew on an ongoing basis who was and was not showing up for work. *Id.* ¶ 30.

Carey indicated on the exit interview form that the plaintiff was eligible to be rehired based on Wal-Mart's philosophy that people deserve a second chance if their situations change. *Id.* ¶ 33. The plaintiff could have appealed Carey's decision to terminate her to Tyler and, if Tyler agreed with Carey's decision, the plaintiff could have appealed to the district manager. *Id.* ¶ 34. The plaintiff did not appeal her termination to Tyler. *Id.* ¶ 65. Both Carey and Tyler testified that they considered the plaintiff's lack of compliance with Wal-Mart's attendance policy to be "gross misconduct." *Id.* ¶¶ 33, 60.<sup>1</sup> Wal-Mart's Coaching for Improvement Policy is a progressive discipline policy that has four levels of coaching. *Id.* ¶ 58. Under Wal-Mart's attendance policy, attendance is tracked on a point system that dictates progressive discipline based on the number of points that an employee receives. Plaintiff's Statement of Material Facts ("Plaintiff's SMF") (Docket No. 13) ¶¶ 33-36; Defendant's

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<sup>1</sup> The plaintiff disputes the testimony of these individuals, but merely cites the definitions included in Wal-Mart's written policy as the basis for her denial of these assertions. Plaintiff's Responsive SMF ¶¶ 33, 60. The policy language does not and cannot serve as proof that these individuals did not believe that the plaintiff's behavior was appropriately so characterized, which is the only purpose for  
(continued on next page)

Objection to Plaintiff's Statement of Material Facts ("Defendant's Responsive SMF") (Docket No. 18) ¶¶ 33-36. The Coaching for Improvement Policy does not apply to situations involving gross misconduct. Defendant's SMF ¶ 59; Plaintiff's Responsive SMF ¶ 59.

The plaintiff has a hereditary disease known as Charcot-Marie-Tooth disease. Plaintiff's SMF ¶ 1; Defendant's Responsive SMF ¶ 1. Lay people often refer to Charcot-Marie-Tooth disease as muscular dystrophy; the symptoms of advanced Charcot-Marie-Tooth disease are very similar to those of muscular dystrophy. *Id.* This disease has substantially limited the plaintiff's ability to walk and run. *Id.* ¶ 3. The plaintiff's foot surgery was related to her disease. *Id.* ¶ 12.

### **III. Discussion**

With the exception of the plaintiff's claim for punitive damages, which I will address below, the parties agree that this court's analysis of the plaintiff's ADA claim is also applicable to her MHRA claim. Defendant's Memorandum at 8 n.1; Plaintiff's Memorandum at 1 n.2. This is an accurate statement of the applicable law. *See Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 14 (1st Cir. 1997).

#### **A. The Discrimination Claim**

The defendant contends that the burden-shifting analysis first employed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), applies here. Defendant's Memorandum at 8. The plaintiff responds that this approach is not applicable because she has provided direct evidence of discriminatory animus. Plaintiff's Memorandum at 2. While it is true that the burden-shifting approach is to be used only in cases in which there is no direct evidence of prohibited discrimination, *e.g., Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 580-81 (1st Cir. 1999), the evidence

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which the testimony is offered.

upon which the plaintiff relies does not meet the applicable definition of direct evidence for this purpose.

Inherently ambiguous remarks do not directly reflect discriminatory animus. *Id.* at 583. The plaintiff offers the following as evidence of discriminatory animus on the part of Carey:<sup>2</sup> (i) a conversation approximately six weeks before the plaintiff's termination in which Carey allegedly responded to the statement by Theresa Barrows, the store's personnel manager, that "We don't feel that Shawnee should be working here because of all of her health problems. She is disabled, we understand that, but we just really can't tolerate this in our store," by saying "I know. I know. I know. I hear ya. I know;" and Carey's alleged statements to the plaintiff during her exit interview that "We understand you are disabled, we understand that you have health problems, but you have missed a lot of work," and "Well, we understand your problems and it's just too hard here and it gets harder when we have a person like you in our store. We understand that you're disabled, but you really don't need to be working here." Plaintiff's Memorandum at 3; Plaintiff's SMF ¶¶ 5, 21, 25.<sup>3</sup> Like the statements at issue in *Fernandes* — "I don't need minorities, and I don't need residents on the job" and "I don't have to hire you locals or Cape Verdean people" — these statements are capable of interpretation in a manner that does not necessarily demonstrate a discriminatory animus as the basis for the decision to terminate the plaintiff's employment. 199 F.3d at 583. *See also Febres v. Challenger Caribbean Corp.*, 214 F.3d 57, 60 (1st Cir. 200) ("[E]vidence is 'direct' (and thus justifies a mixed-motive jury instruction) when it consists of statements by a decisionmaker that directly affect the alleged animus and bear squarely on the contested employment decision."); *Scott v. Sulzer Carbomedics, Inc.*, \_\_\_ F.Supp.2d \_\_\_, 2001 WL 539468 (D. Mass. May 15, 2001) at \*9 ("Presumably, direct evidence of

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<sup>2</sup> The plaintiff does not dispute the assertion that Carey alone made the decision to terminate her employment. Defendant's SMF ¶ 31; Plaintiff's Responsive SMF ¶ 31.

<sup>3</sup> The defendant denies that these remarks were made. Defendant's Responsive SMF ¶¶ 21 & 25 and record citations included (*continued on next page*)

discrimination would involve that exceptionally rare situation where a supervisor actually admits that unlawful animus motivated his decision or played a significant part in it.”) *See also Dudley v. Augusta Sch. Dep’t*, 23 F. Supp.2d 85, 94 (D. Me. 1998) (“Only the most blatant remarks whose intent could only be to discriminate constitute direct evidence,” quoting *Nedder v. Rivier College*, 944 F. Supp. 111, 114 n.3 (D. N.H. 1996); need to make inferential leap in order to discern discriminatory intent in statement at issue “is the mark of indirect, not direct, evidence.”). Accordingly, the plaintiff’s claim may not be analyzed under the mixed-motive approach available when there is direct evidence of discriminatory animus. The burden-shifting, pretext analysis is applicable here. *Laurin v. Providence Hosp.*, 150 F.3d 52, 58 (1st Cir. 1998).

To establish a claim under the ADA, a plaintiff must prove by a preponderance of the evidence (1) that she was disabled within the meaning of the ADA; (2) that she was able to perform, with or without reasonable accommodation, the essential functions of her job; and (3) that the adverse employment decision was based in whole or in part on her disability.

*Soto-Ocasio v. Federal Express Corp.*, 150 F.3d 14, 18 (1st Cir. 1998). The defendant contends that the plaintiff cannot establish the first element of this test. Defendant’s Memorandum at 9.<sup>4</sup> The defendant maintains that the plaintiff has produced no evidence “medical or otherwise” that she is substantially limited in the major life activity of walking, *id.* at 10, which is required to demonstrate the existence of a disability under the circumstances of this case, 42 U.S.C. § 12102(2)(A); 29 C.F.R. § 1630.2(i). To the contrary, the defendant has admitted that the plaintiff is “significantly limited in her ability to walk and run,” Plaintiff’s SMF ¶ 3, Defendant’s Responsive SMF ¶ 3, and the plaintiff

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therein.

<sup>4</sup> The defendant relies on an earlier First Circuit opinion, *Jacques v. Clean-Up Group, Inc.*, 96 F.3d 506, 511 (1996), which included the requirement that the plaintiff show that she was replaced by a non-disabled person or was treated less favorably than non-disabled employees and that she suffered damages as a result. The defendant contends that the plaintiff does not provide evidence of such replacement or disparate treatment. Defendant’s Memorandum at 9. I read *Soto-Ocasio* as a refinement of the First Circuit standard rendering unnecessary any such proof. In any event, the defendant has waived the point by not discussing its contention that proof of this element is lacking. *Graham v. United States*, 753 F. Supp. 994, 1000 (D. Me. 1990) (“It is settled beyond peradventure that issues mentioned in a perfunctory manner, unaccompanied by some effort at developed argumentation are deemed (continued on next page)

has submitted the affidavit of her treating physician, who states: “Throughout the time that I have treated Shawnee, her C[harcot]M[arie]T[ooth] [disease] has rendered her substantially limited in her ability to walk and run. She has been significantly limited in her ability to walk and run if compared to an adult who does not have CMT with otherwise similar attributes to Ms. Patten,” Affidavit of Jutta Eichelman, M.D. (Docket No. 15) ¶ 7. Nothing further is required to meet the plaintiff’s *prima facie* burden on this element of her claim.

Once the plaintiff meets her *prima facie* burden concerning the elements set forth in *Soto-Ocasio*, the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment decision. *Dichner v. Liberty Travel*, 141 F.3d 24, 30 (1st Cir. 1998). Here, the defendant relies on Carey’s testimony that she terminated the plaintiff’s employment solely due to her attendance problems during the two or three weeks before the termination and that she was “completely unaware that Shawnee Patten had any form of disability.” Defendant’s SMF ¶¶ 29, 32; Defendant’s Memorandum at 14-18. The amount of scheduled work time that the plaintiff missed during this period and the extent of Carey’s knowledge concerning the plaintiff’s disability are very much disputed in this case. *See* Plaintiff’s Responsive SMF ¶¶ 26, 32. Particularly when the evidence offered by the plaintiff is given the benefit of all reasonable inferences in her favor, as is required at this stage of the proceedings, it cannot be said that the material facts upon which the defendant bases its arguments concerning its asserted legitimate, nondiscriminatory reason for the termination are undisputed. The defendant nonetheless contends that the plaintiff must offer evidence to show not only that the defendant’s proffered reason is false but also that the defendant’s true motive was discriminatory. Defendant’s Memorandum at 15. *See Braverman v. Penobscot Shoe Co.*, 859 F. Supp. 596, 601 (D. Me. 1994) (the plaintiff “must do more than merely cast doubt on the [defendant’s]

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waived.”) (citation and internal quotation marks omitted).

articulated reason to establish discriminatory intent”); *cf. Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 168 (1st Cir. 1998) (“The nonmoving plaintiff may demonstrate pretext either indirectly by showing that the employer’s stated reasons for its adverse action were not credible, or directly by showing that the action was more likely motivated by a discriminatory reason.”). In this case, the plaintiff has offered evidence, including the alleged remarks of Carey quoted above; the defendant’s attendance policy and its Coaching for Improvement policy and the defendant’s alleged failure to comply with those policies; and her own testimony concerning scheduled time that she did not work during the relevant period, Affidavit of Shawnee Patten (Docket No. 16) ¶ 2, both to rebut the defendant’s asserted reason and to suggest the existence of illegal animus, *see Woods v. Friction Materials, Inc.*, 30 F.3d 255, 262 (1st Cir. 1994). Accordingly, the defendant’s motion for summary judgment should be denied.

This conclusion makes it unnecessary to address the parties’ arguments concerning the report and findings of the Maine Human Rights Commission and the defendant’s alleged spoliation of evidence. Plaintiff’s Memorandum at 10, 14-15; Defendant’s Reply to Plaintiff’s Objection to Defendant’s Motion for Summary Judgment (“Defendant’s Reply”) (Docket No. 17) at 4-6. These issues should be brought before the court before trial by means of motions *in limine*.

### **B. Punitive Damages**

Relying solely on Maine common law, the defendant contends that the plaintiff has not presented evidence sufficient to allow the presentation of her claim for punitive damages to the jury. Defendant’s Memorandum at 20; Defendant’s Reply at 6. The standard for an award of punitive damages on an ADA claim is established by 42 U.S.C. § 1981a(b)(1) and for an MHRA claim by 5 M.R.S.A. § 4613(2)(B)(8). Neither is governed by Maine common law.

The applicable federal statute provides:

A complaining party may recover punitive damages under this section against a respondent . . . if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

42 U.S.C. § 1981a(b)(1). The state statute provides that, in cases of intentional discrimination,

[a] complaining party may recover punitive damages under this subparagraph against a respondent if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or reckless indifference to the rights of an aggrieved individual protected by this Act.

5 M.R.S.A. § 4613(2)(B)(8)(c). The language of the two statutes is sufficiently similar to allow case law interpreting the federal statute to be applied to parallel claims under the state statute.

The plaintiff has offered no evidence that Carey acted with malice. Thus, in order to recover punitive damages she must show that the Carey knew that she might be acting in violation of federal law, or that she acted in the face of a perceived risk that her actions would violate federal law. *Iacobucci v. Boulter*, 193 F.3d 14, 26 (1st Cir. 1999). The First Circuit has made clear that the focus of the punitive damages inquiry in an ADA case is “on the acting party’s state of mind.” *Romano v. U-Haul Int’l*, 233 F.3d 655, 669 (1st Cir. 2000). In this case, it is not necessary to reach the question whether Carey’s bad acts may be imputed to the corporate defendant for purposes of punitive damages, *id.*, because the plaintiff has offered no evidence that Carey had the necessary knowledge or perception of risk. She offers only the assertion that the defendant, “through Mr. Tyler, was aware of the fact that it is illegal to fire a person because of her disability.” Plaintiff’s Memorandum at 16; Plaintiff’s SMF ¶ 53; Defendant’s Responsive SMF ¶ 53. A reasonable inference concerning Carey’s knowledge cannot be drawn from this assertion, and it is Carey’s knowledge, as the sole decisionmaker involved, that is crucial. *Romano*, 233 F.3d at 669. Accordingly, the defendant’s motion for summary judgment as to the plaintiff’s claim for punitive damages must be granted.



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