

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DEBORAH KALLEN,)	
)	
Plaintiff)	
)	
v.)	Docket No. 00-365-P-H
)	
CABOT HOUSE, INC.,)	
)	
Defendant)	

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

The defendant, Cabot House, Inc., moves for summary judgment in this action alleging discrimination in employment in 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.* I recommend that the court grant the motion.

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.

The plaintiff received a master's degree in speech pathology in 1980 and worked in that field and related positions from 1980 through 1995. Defendant's Statement of Material Facts ("Defendant's SMF") (Docket No. 9) ¶¶ 1-3, 5, 7-11; Plaintiff's Response to Defendant's Statement of Material Facts ("Plaintiff's Responsive SMF") (Docket No. 16) ¶¶ 1-3, 5, 7-11. After working at a series of temporary clerical jobs and applying for a number of other jobs, the plaintiff saw the defendant's newspaper ad for a full-time sales and interior design associate. *Id.* ¶¶ 14-16. She applied for the job even though she had never been to the defendant's store. *Id.* ¶ 16. She had never done anything like furniture sales before, had never worked as an interior designer, and had never had a job in which she

was paid on a commission basis. *Id.* ¶ 18. At the time she applied for this job, the plaintiff was in the midst of a financial crisis. *Id.* ¶ 20.

The defendant operates a furniture store in South Portland, Maine. *Id.* ¶ 17. The manager of this store from 1993 through 2000 was Cathy Scott. *Id.* At her interview, the plaintiff assured Scott that she was bright. *Id.* ¶ 19. Scott hired the plaintiff for an eight-week probationary period beginning October 12, 1998. *Id.* ¶ 22. The qualifications for the position were as follows: the salesperson had to generate revenues for the company and would need to be very articulate, able to communicate rapidly with customers, able to be convincing, talented both in his or her selling skills and design skills, flexible, able to grab a catalogue and retrieve information from it quickly, be very good with personalities, able to “read” people quickly, administratively equipped to do the paper work and the follow-up and to analyze costs. *Id.* ¶ 23. At least fifty percent of the defendant’s sales were generated from the catalogues. *Id.* ¶ 27. When she hired the plaintiff, Scott knew that the plaintiff held a bachelor’s degree in English and a master’s degree in speech communication. Plaintiff’s Statement of Material Facts (“Plaintiff’s SMF”) (Docket No. 14) ¶ 1 (first sentence); Defendant’s Reply Statement of Material Facts (“Defendant’s Responsive SMF”) (Docket No. 20) ¶ 1. Scott knew that the plaintiff did not have sales experience. *Id.* (third sentence); Deposition of Cabot House, Inc. (by Catherine Scott) (“Scott Dep.”) at 13.

In Scott’s opinion, the plaintiff proved to be lacking in the necessary skills for the position. Defendant’s SMF ¶ 24; Scott Dep. at 24-28, 53, 60.¹ Specifically, Scott believed that the plaintiff did not know how to deal with customers in a way that would result in sales, did not know what it took to make a sale or how to follow a strategy that would lead to a sale, did not know how to ask the right

¹ The plaintiff disputes Scott’s assertions concerning her job performance, based on the plaintiff’s own assessment. Plaintiff’s Responsive SMF ¶ 24. However, she does not dispute that the assertions accurately represent Scott’s opinion, and that is the only basis upon which they are included here.

questions in order to determine what the customer was really looking for, and did not connect with customers in a productive way. *Id.* Scott believed that the plaintiff failed to grasp the defendant's procedures and systems. Defendant's SMF ¶ 26; Scott Dep. at 55. For each of the four sales the plaintiff generated, her paperwork had to be corrected. Defendant's SMF ¶ 25 (first sentence), Plaintiff's Responsive SMF ¶ 25; Defendant's SMF ¶ 26 (third sentence), Plaintiff's Responsive SMF ¶ 26; Scott Dep. at 36, 63.

Around the end of October, Scott told another employee of the defendant that the plaintiff "was going to be a person that [Scott] had a lot of doubt [about] relative to her success." Defendant's SMF ¶ 28; Plaintiff's Responsive SMF ¶ 28; Scott Dep. at 21-22. The plaintiff was "a little bit of a slow learner on the job," had problems with "the lay of the land" with respect to location of furniture in the store, found the system by which salespeople took turns with customers confusing and took longer than others to learn how to use the catalogs. Defendant's SMF ¶ 30; Plaintiff's Responsive SMF ¶ 30; Deposition of Deborah Kallen (June 26, 2001) ("Plaintiff's Dep. II") at 10, 19. Scott increasingly made negative comments to the plaintiff about the plaintiff's performance; by November 16, her criticism was "constant." Defendant's SMF ¶ 31; Plaintiff's Responsive SMF ¶ 31.

On or shortly after November 16, 1998 the plaintiff informed Scott for the first time that she suffered from depression and anxiety. *Id.* ¶ 33. She said that her depression and anxiety were making it difficult for her to do her job and that it made it more difficult for her to learn and concentrate. Plaintiff's SMF ¶ 10 (first sentence); Defendant's Responsive SMF ¶ 10. She told Scott that she could see that Scott was becoming increasingly frustrated with her and disappointed in her performance, but that Scott's increasingly negative comments and criticisms were causing her greater anxiety and making the situation worse. Defendant's SMF ¶ 33; Plaintiff's Responsive SMF ¶ 33. The plaintiff then requested that Scott speak with her job counselor, extend the eight-week probationary period by

an additional two weeks if Scott was still dissatisfied with her performance at the end of that time and comment positively on things that the plaintiff was doing right, which would help decrease her anxiety and improve her work performance. *Id.* ¶ 33; Plaintiff’s Dep. II at 20. The plaintiff used the word “accommodations” to refer to these requests. Plaintiff’s SMF ¶ 10 (second sentence); Defendant’s Responsive SMF ¶ 10. These requests were not suggested by a professional; the plaintiff thought them up herself. Defendant’s SMF ¶ 37 (first sentence); Plaintiff’s Responsive SMF ¶ 37.

The plaintiff has suffered from depression since childhood. *Id.* ¶ 34. Dr. John Scamman, a psychiatrist who treated the plaintiff from April 1995 to March 1999, diagnosed her as having major depression and dysthymia (chronic mild depression). *Id.* ¶ 35. In Dr. Scamman’s opinion, the plaintiff’s condition limits her ability to think, to reason, to problem-solve, to concentrate, to learn and to work and interferes with her memory and attention span at levels that fluctuate with the degree of her depression. *Id.*

Scott did not attempt to contact the plaintiff’s job counselor and did not offer positive feedback. Plaintiff’s SMF ¶ 11; Defendant’s Responsive SMF ¶ 11. Scott terminated the plaintiff’s employment on November 22, 1998. Defendant’s SMF ¶ 38; Plaintiff’s Responsive SMF ¶ 38. No employees other than the plaintiff were terminated by Scott before the end of the probationary period. Plaintiff’s SMF ¶ 7 (first sentence); Defendant’s Responsive SMF ¶ 7.

III. Discussion

The applicable section of the ADA provides as follows:

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). To establish a claim under the ADA, a plaintiff must prove

(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 show that she was a “qualified individual with a disability.” Defendant’s Motion for Summary Judgment, etc. (“Motion”) (Docket No. 8) at 4-8. The

ADA defines this term 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. For purposes of this subchapter, consideration shall be given to the employer’s judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

42 U.S.C. § 12111(8). The Department of Labor’s regulations implementing the ADA provide a further refinement of the definition.

Qualified individual with a disability means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.

29 C.F.R. § 1630.2(m).

The court’s analysis of the plaintiff’s ADA claim will resolve the motion for summary judgment on her state-law claim as well.

In analyzing the ADA and MHRA, the Court need not continuously distinguish between the two statutes as to their scope and general intent because Maine courts consistently look to federal law in interpreting state anti-discriminatory statutes. Thus while the Court will focus on the ADA, the necessary conclusions as to the Plaintiff’s MHRA claim flow directly from this analysis.

Soileau v. Guilford of Maine, Inc., 928 F. Supp. 37, 45 (D. Me. 1996) (citations omitted).

The defendant contends that the plaintiff cannot satisfy either of the two parts of the regulatory definition. First, it argues, she did not have the proper skills, training and experience for the sales position for which Scott hired her. Motion at 5. The plaintiff acknowledges that she lacked experience in sales work. Defendant's SMF ¶ 18; Plaintiff's Responsive SMF ¶ 18.² The defendant points to Scott's criticism of the plaintiff's performance on the job as evidence of her lack of qualifications. Motion at 5-6. The defendant's argument, given the circumstances in this case, where Scott knew about the plaintiff's lack of sales experience when hiring her and there is no suggestion that the plaintiff concealed any relevant information concerning her skills and experience, would allow any employer to discriminate against an employee on the basis of a disability with impunity so long as that employer had hired that employee in spite of his or her lack of appropriate experience. Like the court in *Cinelli v. U.S. Energy Partners*, 77 F.Supp.2d 566, 575-77 (D. N.J. 1999), I am reluctant to conclude that an employer's dissatisfaction with the performance of an employee is sufficient evidence to support summary judgment based on the first element of an ADA claim. While it is possible to conceive of circumstances under which the mere hiring of an employee could not establish that the employee had the necessary skill and experience for the job, those circumstances are not present here, particularly when the plaintiff is given the benefit of reasonable inferences to be drawn from the evidence in the summary judgment record.

The defendant next contends that the plaintiff was not capable of performing the essential functions of the job, with or without the accommodations she requested. Motion at 6-8.

The examination of an employee's "qualified" status requires consideration of available reasonable accommodations. The analysis is generally broken into two steps: (1) whether the employee could perform the essential functions of the job; (2) if not, whether any reasonable accommodation by the employer would enable him to perform those functions.

² See also Plaintiff's Responsive SMF ¶ 24: "It is not disputed that Plaintiff lacked the necessary skills when she was first hired because she had never worked in furniture sales before."

Ward v. Massachusetts Health Research Inst., Inc., 209 F.3d 29, 33 (1st Cir. 2000).

With respect to this second element of the regulatory definition, the plaintiff responds that she was performing adequately, given the length of her employment, based primarily on her own evaluation of her performance. Plaintiff's Responsive SMF ¶¶ 24, 26-27, 30. In the alternative, she points to the fact that Scott fired her before the probationary period had ended and contends that, had Scott provided the accommodations the plaintiff requested, her performance would have improved. Plaintiff's Objection to Defendant's Motion for Summary Judgment ("Plaintiff's Objection") (Docket No. 13) at 6-8.

In support of the latter contention, the plaintiff offers her own opinion and those of Dr. Scamman and Elinor Weissman, a job counselor who worked with the plaintiff beginning in May 2000. *Id.* at 7-8; Plaintiff's SMF ¶¶ 12-16; Affidavit of Elinor Weissman (Docket No. 15) ¶ 4. The defendant has objected to the deposition testimony of Scamman and the Weissman affidavit as "based on inadmissible conjecture," Defendant's Responsive SMF ¶¶ 12-13, 15-16,³ and to the affidavit on the additional grounds that it "is conclusory and inadmissible," provides no basis for the opinions offered and fails to comply with Fed. R. Civ. P. 56(e), Defendant's Reply Memorandum in Support of Defendant's Motion for Summary Judgment ("Defendant's Reply") (Docket No. 19) at 2-3.

With respect to the first step of the *Ward* analysis, the defendant correctly points out, Defendant's Reply at 3-4, that a plaintiff's self-serving, conclusory assertion that she has satisfied an element of her claim is insufficient to avoid entry of summary judgment.

Even in employment discrimination cases where elusive concepts such as motive or intent are at issue, [the Rule 56] standard *compels* summary judgment if the non-moving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation.

³ The lack of any citation to authority in support of this objection and any explication of the basis for the objection makes it difficult for the court to avoid engaging in conjecture itself in order to deal with the objection.

Straughn v. Delta Air Lines, Inc., 250 F.2d 23, 33 (1st Cir. 2001) (emphasis in original; citation and internal punctuation omitted). *See also SMS Sys. Maintenance Servs., Inc. v. Digital Equip. Corp.*, 188 F.3d 11, 20 (1st Cir. 1999) (conclusory, self-serving testimony need not be credited on summary judgment).

Here, the plaintiff offers the following to support her contention that she “was performing her job adequately given the length of her employment,” Plaintiff’s Opposition at 5: (i) “In Plaintiff’s judgment, as of November 19, 1998, she thought she was performing her job satisfactorily,” Plaintiff’s Responsive SMF ¶¶ 24, 26, 30; (ii) “Plaintiff was catching on at an appropriate pace given the length of time she had been there, and she was performing her job reasonably well,” *id.* ¶¶ 26, 30; (iii) “The job took time to learn . . . and it was expected that salespeople would develop the necessary skills over the eight-week probationary period,” *id.* ¶ 24; (iv) Scott “did not have any customer complaints about Plaintiff,” did not give the plaintiff any written warnings, did not tell the plaintiff that her employment would be terminated if her performance did not improve, and was no more critical of the plaintiff than she was of other salespeople, *id.* ¶¶ 24, 31; and (v) it took at least 30 days to learn how to use the catalogs in the defendant’s store, *id.* ¶¶ 27, 30. The first of these statements is supported only by a citation to the plaintiff’s affirmative response to a question, stated in the same conclusory fashion, at her deposition and accordingly may be discounted. The second statement is not supported by the citations to the record given by the plaintiff and therefore may not be considered. The third statement is not supported by the citations given, with the exception of the deposition testimony of Nancy Wheeler, another sales associate, that “[t]he first month there shouldn’t be any sales because they’re learning the catalogs.” Deposition of Nancy J. Wheeler at 30. The fourth statement is supported by the record citations. The fifth statement is supported only by the testimony of Wheeler quoted above.

Thus, the evidence presented by the plaintiff to support her contention that she was performing her job adequately at the time she was fired is that sales associates were not expected to make sales during the first month of their employment because they were “learning the catalogs,” customers had not complained about the plaintiff, Scott did not warn the plaintiff in writing or tell her specifically that she would be terminated if her performance did not improve, and Scott was no more critical of the plaintiff than she was of other sales associates. None of this evidence necessarily establishes that the plaintiff was performing adequately over five weeks after she began work. Most of this evidence does not address the concerns Scott had about the plaintiff’s performance. *See* Defendant’s SMF ¶¶ 24-27, 31. The testimony of Wheeler that Scott was no more critical of the plaintiff than she was of the other sales associates, who were not fired, standing alone, could not support a reasonable inference that the plaintiff was performing adequately. The plaintiff’s specific request for accommodations, moreover, demonstrates that she was aware that her performance was not adequate. It is therefore necessary to consider the second step of the *Ward* analysis.

In that regard, the plaintiff understandably cites no authority to support the necessarily-implied basis of her reliance on the fact that Scott terminated her employment before the probationary period had run its course — that she was entitled as a matter of law to the entire probationary period in order to prove her ability to perform the job. The mere fact that an employer establishes a set probationary period when hiring an employee does not and cannot mean that the employer must then continue to employ that individual for the full probationary period before determining that he or she is not performing adequately. Nor does the fact that a probationary employee is fired before completion of the probationary term, standing alone, provide evidence of discriminatory animus or improper motive on the part of the employer. *See Flemming v. City of Portland*, 2000 WL 116073 (D. Or. Jan. 5,

2000), at *20 (no negative inference can be drawn against city for terminating plaintiff nine months into eighteen-month probationary period).

The plaintiff's contention that her performance would have improved if Scott had provided the requested accommodations begins with the assertion that her performance problems were related to her depression and anxiety. Plaintiff's SMF ¶ 9.⁴ She then asserts that "[h]ad the accommodations been provided, [her] performance would have improved, and she unquestionably would have been able to perform the essential job functions," citing paragraphs 24-27 and 30-31 of her responsive statement of material facts and paragraphs 12 to 16 of her separate statement of material facts. Plaintiff's Objection at 7. Nothing in the cited paragraphs of the plaintiff's responsive statement of material facts supports this contention. Of the cited paragraphs of the plaintiff's statement of material facts, the only one to which the defendant does not object specifies certain aspects of the plaintiff's work on which Scott could have commented favorably. Plaintiff's SMF ¶ 14; Defendant's Responsive SMF ¶ 14. The defendant objects to the remaining paragraphs as "based on inadmissible conjecture." Defendant's Responsive SMF ¶¶ 12-13, 15-16.

The first of these paragraphs states as follows:

If Ms. Scott had spoken with Plaintiff's vocational counselor it would have provided Ms. Scott with an opportunity to better understand Plaintiff's depression and anxiety, which would have enabled Ms. Scott to better manage Plaintiff.

Plaintiff's SMF ¶ 12. This is supported by the plaintiff's own testimony that she felt that talking with her job counselor would "help [Scott] in being a better manager of me," Plaintiff's Dep. II at 24, and Dr. Scamman's testimony that such a conversation would have provided Scott with an opportunity to better understand the plaintiff's condition, Deposition of John Scamman, M. D. ("Scamman Dep.") at

⁴ The defendant objects to Dr. Scamman's testimony, on which the plaintiff relies to support this contention, as "rest[ing] on pure speculation." Defendant's Responsive SMF ¶ 9. I have reviewed the cited pages of Dr. Scamman's deposition and I disagree. Dr. (continued on next page)

23. Dr. Scamman’s statement is not speculative, and the defendant’s objection accordingly does not bar consideration of this evidence. However, the plaintiff’s statement about Scott cannot fairly be characterized as anything other than speculation, particularly in the absence of any evidence to provide a foundation for her prediction of Scott’s behavior. In any event, neither statement provides support for the plaintiff’s contention that her work performance would have improved to the point where she could perform all of the essential functions of the job adequately if Scott had talked with her vocational counselor. There is nothing in the summary judgment record to suggest that an opportunity to better understand the plaintiff’s condition, or “better management” of the plaintiff by Scott — a term so general as to be of little evidentiary value without further explication that is not provided by the plaintiff — would have resulted in better performance by the plaintiff.

The second paragraph provides:

Because Plaintiff is sensitive to criticism and rejection, it seriously exacerbated her depression and anxiety to receive only negative feedback, and this impaired her functioning. If she had received some positive feedback, Plaintiff’s anxiety would have been reduced, which would have improved her job performance.

Plaintiff’s SMF ¶ 13. Again, the plaintiff offers her own testimony and that of Dr. Scamman in support of this assertion. And again, the plaintiff’s testimony is speculation, but that of Dr. Scamman is not. The defendant also states that “Dr. Scamman did not treat or observe Plaintiff during the period she received criticism and ‘only negative feedback.’” Defendant’s Responsive SMF ¶ 13. Treating this as an objection asserting lack of foundation for Dr. Scamman’s testimony, I conclude that the foundation laid in the deposition testimony is adequate and that the defendant’s objection goes to the weight of that testimony rather than to its admissibility. Dr. Scamman’s testimony supports the first sentence and all but the last phrase of the second sentence of this paragraph. The plaintiff’s

Scamman’s testimony sets forth an adequate basis for this testimony.

objectionable testimony supports the final phrase of the second sentence. Even if it were admissible, this testimony, like that presented in paragraph 15 of the plaintiff's statement of material facts, does not support an inference that any such improvement in the plaintiff's performance would have allowed her to perform the essential functions of the job adequately, a crucial element of her burden of proof.

The third paragraph at issue provides:

If Plaintiff had been provided an additional two weeks of a probationary period, it would have enabled Plaintiff to better learn the things she needed to learn.

Plaintiff's SMF ¶ 15. The plaintiff cites her own testimony and that of Dr. Scamman in support of this assertion. As was the case with the paragraphs discussed above, I do not find Dr. Scamman's cited testimony to be speculative. Dr. Scamman's testimony supports the entire paragraph. Scamman Dep. at 28-29. Accordingly, it is not necessary to consider whether the plaintiff's testimony in this regard is also admissible. However, this paragraph also does not support the necessary final element of the plaintiff's burden of proof — whether better learning by the plaintiff would have resulted in adequate performance of the essential functions of the job.

The final paragraph at issue provides:

If Plaintiff had been provided the three accommodations she requested, she would have been very articulate; she would have been able to communicate rapidly; she would have been able to be convincing; she would have been able to access and utilize information effectively; and she would have been able to read people quickly.

Plaintiff's SMF ¶ 16. The record support cited for this assertion is paragraph 9 of the Weissman affidavit. With one important qualification, that paragraph of the affidavit does support this assertion.

The qualification addresses the fourth ability set out in the assertion. Weissman actually stated that "once she commits information to memory, [the plaintiff] is able to access and utilize it effectively,"

and that the requested accommodations would have allowed the plaintiff to display this characteristic, among others. Weissman Aff. ¶ 9.

The defendant objects to the Weissman affidavit on several grounds, asserting that it is conclusory, without foundation, provides no support for her conclusions, and made upon information and belief in violation of the requirements of Fed. R. Civ. P. 56(e). Defendant's Reply at 2-3. With respect to the latter argument, the jurat to the Weissman affidavit states that the affiant's statements are made upon "her own knowledge, information or belief." Weissman Aff. at 2. "It is apodictic that an affidavit made upon information and belief does not comply with Rule 56(e)." *Sheinkopf v. Stone*, 927 F.2d 1259, 1271 (1st Cir. 1991). This does not mean that the entire Weissman affidavit must be disregarded, however. To the extent that it is clear that paragraph 9 is based on Weissman's own personal knowledge, it may nonetheless be considered by the court. *Perez v. Volvo Car Corp.*, 247 F.3d 303, 316 (1st Cir. 2001). Paragraph 9 of the Weissman affidavit states the affiant's opinions, which must be considered to be within her personal knowledge. While this paragraph of the affidavit is somewhat conclusory, standing alone, the other paragraphs of the affidavit provide sufficient support for Weissman's conclusions and provide sufficient foundation for her testimony.

The defendant also argues that the characteristics identified by Weissman only address "a fraction of the necessary qualifications for the sales associate position." Defendant's Reply at 6-7. It is true that Weissman's listed characteristics do not directly address four of the ten qualifications listed by the defendant: generating revenue, being talented in selling and design skills, being flexible, and being "administratively equipped to do the paperwork and the follow-up and to analyze costs." Defendant's SMF ¶ 23. The plaintiff has presented no evidence or argument to suggest that these qualifications are not equal in importance to those that she has addressed or that they were in fact not essential to successful performance of the job. In the absence of such evidence, it would not be

reasonable as a matter of law to allow a jury to infer that the plaintiff could have performed all of the essential functions of the job at issue had the three accommodations that she requested been provided.

Paragraph 9 of the Weissman affidavit, the only evidence provided by the plaintiff that goes to the ultimate issue that she must prove, is thus insufficient to allow a jury to draw the reasonable inference that the plaintiff could have performed the essential functions of the job she held at the defendant's store had she been provided with the requested accommodations. The plaintiff's evidence is insufficient at the second step of the *Ward* analysis. Accordingly, the plaintiff has failed to point to sufficient facts demonstrating the existence of a trialworthy issue concerning her "qualified" status under the ADA.

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.

Date this 17th day of September, 2001.

David M. Cohen
United States Magistrate Judge

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