

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

HOLLY A. SWIFT,)
)
 Plaintiff,)
)
 v.) Civ. No. 08-35-B-W
)
 BANK OF AMERICA, d/b/a)
 MBNA AMERICA,)
)
 Defendant.)

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

In March of 2006, Holly Swift received news that she had ductal carcinoma *in situ* in her right breast and was scheduled for a double mastectomy in April. Her employer, Bank of America d/b/a MBNA America, granted her paid leave beginning that month for acute anxiety related to the diagnosis and for the forthcoming surgical procedure. Swift remained on paid leave through June. In July of 2006, prior to the final stage of reconstructive surgery, scheduled for August 3, the defendant concluded that Swift was no longer entitled to any leave, paid or unpaid, and told Swift it would terminate her for "job abandonment" if she did not voluntarily resign or report to work with a medical release from a physician. Swift refused to resign and declined to ask her primary care physician to change a recommendation that she remain out of work until after she recovered from the final stage of reconstructive surgery. Swift requested unpaid leave for approximately seven more weeks, and, in the alternative, offered to return to work without a medical release to avoid losing her job. Bank of America denied both requests and terminated Swift for "job abandonment." By terminating Swift for job abandonment a Bank

of America policy barred Swift from ever working for the Bank again, despite the fact that she had consistently received very positive performance evaluations during her seven years with the Bank.

On January 31, 2008, Swift filed the instant action against Bank of America, alleging failure to accommodate and disability discrimination in violation of the Maine Human Rights Act. Included in her complaint is a claim of defamation based on the allegedly disparaging "job abandonment" blot on her employment record, which the Bank published to the Department of Health and Human Services and which Swift herself related to prospective employers when asked to explain why she no longer worked for the Bank. On December 1, 2008, Bank of America filed a motion for summary judgment against all claims. The Court referred the motion to me for a report and recommendation. Based on my review of the record, I conclude that genuine issues of material fact prevent the entry of summary judgment and recommend that the Court deny the motion.

FACTS

The following facts are drawn from the parties' competing statements of material facts, filed in accordance with Local Rule 56, and from the record cited in support of those statements. See Doe v. Solvay Pharms., Inc., 350 F. Supp. 2d 257, 259-60 (D. Me. 2004) (outlining the mandatory procedure for establishing factual predicates needed to support or overcome a summary judgment motion); Toomey v. Unum Life Ins. Co., 324 F. Supp. 2d 220, 221 n.1 (D. Me. 2004) (explaining "the spirit and purpose" of Local Rule 56).

In March of 2006, Holly Swift requested medical leave and short-term disability (STD) benefits because she had just been diagnosed with ductal carcinoma *in situ* (DCIS) in her right

breast, was scheduled for a double mastectomy in April,¹ and was at that time suffering "acute anxiety" that would undermine her ability to concentrate at work. (Def.'s Amended Statement of Material Facts (DSMF) ¶¶ 37-40, 42, 43, Doc. 51; Pl.'s Response to Def.'s Amended Statement and Statement of Additional Material Facts (PSMF) ¶¶ 37, 38, 42, 233, 322, Doc. 55; Def.'s Reply Statement (DRS) ¶ 233, Doc. 57.) The Bank's STD policy² afforded certain employees with up to 26 weeks of paid STD leave in a rolling 12-month period if unable to work due to illness, injury, or other valid, substantiated medical reasons. (DSMF ¶¶ 15-17; STD Policy, Doc. 34-5.) Leave under the Policy ran concurrently with unpaid leave under the Family Medical Leave Act. (DSMF ¶ 18.) The Bank administered the Policy through its Health and Safety Services department (HSS), which employed occupational nurses. (Id. ¶ 20.) To be eligible for, or to continue on STD leave, an employee was required to submit to HSS adequate medical evidence from a health-care provider, which included the Bank's certificate of disability (COD) form describing the diagnosis, the symptoms, objective findings, current medication, and the health-care providers' current treatment. (Id. ¶ 21.) In order to return to work from STD leave, an employee was required to submit a medical release from a doctor. (Id. ¶ 22.)

Teresa Waters, RN, an occupational health nurse in HSS, oversaw Holly Swift's STD leave. Waters was the top official in Maine with authority over medical leave requests submitted by Maine employees. (Id. ¶ 25; PSMF ¶ 25.) In addition to serving as an occupational health nurse and overseeing HSS in Maine, Waters also served as a senior banking officer, a member of bank management. (PSMF ¶ 25.) One of the stated goals for occupational health nurses was

¹ Removal of Swift's left breast was a preventative measure recommended by the surgeon. (DSMF ¶ 42.)

² The policy in question was a policy of MBNA America Bank, but Bank of America had acquired MBNA prior to the events giving rise to this action. I refer to "the Bank" for the sake of simplicity.

"risk reduction and prevention." (Id. ¶ 262.) In 2002, the Bank evaluated Waters performance in relation to the following goal:

Medically manage all short-term disability cases to ensure average length of disability reduced by 10% for northern region. Projections assume staff increases in Northern region. Projected goals for year end short-term [sic] disability are as follows:

	2001 Days Lost (% Of total days)	2002 Days Lost (% Of total days)	2002 Savings
Northern Region	4.90	4.41 (10%)	\$443,296.

(Id. ¶ 263; Fetterman Dep. Ex. 5, Doc. 69 at 67-68; see also Webbert Decl. ¶ 2, Ex. A, Doc. 49-2 at 1-3 ("risk reduction and prevention" goal also applied in reviews for years 2003-2005).) For 2003, the risk reduction metric called upon Waters to:

Medically manage all short-term disability cases to ensure average length of disability is maintained for the Northern Region. Projections assume current staffing is maintained. Projected goals for year end short-term [sic] disability are as follows: Northern / 2002 Days Lost (% Of total days) 4.29 / 2003 Days Lost (% Of total days) 4.29.

(PSMF ¶ 264; Webbert Decl. ¶ 2, Ex. A, Doc. 49-2 at 8-9.)

The Bank also utilized a case review committee that reviewed, on a weekly basis, whether an employee should receive, or remain eligible for, STD benefits. (DSMF ¶ 29.) The case review committee included a physician, the director of health services, the case manager, and approximately 30 nurse managers throughout the company. (Id. ¶ 30.) In reviewing STD leave requests, the Case Review committee would have access to all the information that was available to the case manager, including all COD's. (Id. ¶ 31.)

Swift's last work day was March 15, 2006. (Id. ¶ 39.) Swift's primary care physician, Dr. Robert Merrill, filled out a COD form in support of Swift's request for leave, indicating to the Bank that leave was needed for both acute situational anxiety, decreased concentration, and an

ongoing surgical referral. (Id. ¶¶ 44, 45, 47.) HSS approved Swift's STD leave beginning March 16, 2006, based on Dr. Merrill's COD. (Id. ¶ 49.) Prior to her surgery, Swift began counseling sessions with John Jeffers, a "licensed social care worker." Jeffers counseled Swift in both individual and group therapy sessions on anger management, anxiety and stress issues. (Id. ¶¶ 81-83.) Waters requested that Swift provide a note from Jeffers. (Id. ¶ 84.) On April 4, 2006, Jeffers completed an MBNA COD providing that Swift should remain out of work for acute situational anxiety and diminished capacity from April 1, 2006, to June 1, 2006, and he claims to have faxed it to MBNA. (Id. ¶ 85.) It appears to be undisputed that Waters never received it. (Id. ¶ 86.) In any event, HSS had already approved Swift's initial STD leave based on Dr. Merrill's COD, which included a diagnosis of acute situational anxiety.

On April 14, 2006, Dr. Honnie Bermas, a general surgeon/breast specialist, performed a double mastectomy and removed lymph nodes on Swift's right side. (Id. ¶ 50.) During the surgery, Dr. Richard Flaherty, a plastic surgeon, performed the first part of her reconstructive breast surgery by placing bilateral tissue expanders in her breasts. (Id. ¶ 51.) On April 27, 2006, Dr. Bermas completed a COD form requesting that Swift remain out of work for four weeks, pending an uneventful recovery. (Id. ¶ 56.) Following her surgery, Swift continued treatment with Dr. Merrill for pain management, chronic anxiety and depression. (DSMF ¶ 66.) She also continued to receive counseling from Jeffers through July 10, 2006. (Id. ¶ 82.)

Shortly after her surgery, Swift went in to the office to pick up her paycheck and said to her supervisor and members of her team that she felt great and wanted them to know she was okay. (Id. ¶ 59.) Swift qualifies this statement saying that she did not actually feel "great" at the time, but made the statement because she wanted these people to know she was okay. (PSMF ¶ 59.)

On May 25, 2006, Dr. Bermas summarized the results of Swift's surgery, noting that her incisions were healing nicely, all margins were negative, the sentinel node (lymph nodes) were negative and that an oncologist recommended no further treatment.³ (DSMF ¶ 57.) Also in May, Swift's plastic surgeon, Dr. Richard Flaherty, observed that Swift was healing well, though one of the expanders had migrated, and that there was no sign of infection. (Id. ¶¶ 89, 92.) There does not appear to have been anything out of the ordinary with respect to Swift's progression toward the second stage of reconstructive plastic surgery, scheduled for August 3, 2006. (Id. ¶¶ 93-94.) Dr. Merrill testified at his deposition that he may have agreed to letting Swift return to work in this timeframe, but only if Swift had indicated a desire and readiness to do so. (Id. ¶ 72.) On June 13, 2006, Dr. Flaherty's office provided a letter to HSS dated June 13, 2006, requesting that Swift remain out of work until her next appointment on June 22, 2006. (Id. ¶ 97.) Another letter sent after the June 22 appointment stated that Swift should remain out of work until further notice. (Id. ¶ 98.) Nurse Waters objected to this letter, saying it was too vague to support continued STD leave. (Id. ¶ 99.) Dr. Flaherty therefore sent another letter dated June 28, 2006, stating Swift should remain out of work because she was experiencing discomfort following recent surgery and was scheduled for a secondary procedure on August 3, 2006. (Id. ¶ 101.) Dr. Flaherty did not highlight any complications other than "discomfort." (Id. ¶ 102.) Swift tried to get Dr. Flaherty to explain in further detail, but he believed that his note was sufficient. (Id. ¶ 103.)

³ Bank of America wants the Court to adopt a statement that the surgical procedure effectively cured Swift of cancer. Swift denies the statement and says that it is speculative. Bank of America replies (inappropriately) that Swift's denial is speculative. (DSMF ¶ 64; PSMF ¶64; DRS ¶ 64.) I am not persuaded that this factual dispute is material because I do not believe that a finder of fact, viewing the record in the light most favorable to Swift, would conclude that being cured of cancer would decisively make it inappropriate for Swift or her primary care physician to request additional surgery-related leave.

Bank of America paints a picture that there was nothing preventing Swift from returning to work four weeks after her surgery, stating that Dr. Bermas recommended that she return to work at that time.⁴ (Id. ¶¶ 60, 64; PSMF ¶ 60.) The exhibit cited in support of this proposition is a COD completed by Dr. Bermas on April 27, 2006, two weeks after Swift's April 14 surgery. Bermas indicated in the COD that Swift would be out another four weeks on account of the surgery, "pending uneventful recovery." (PSMF ¶ 60; Swift Dep. Ex. 5, Doc. 33-4.) Dr. Bermas also indicated 4 more weeks on the line of the form reserved for estimating the return date, "if unsure of actual date." (Swift Dep. Ex. 5.) In opposition to a statement that the discomfort she felt "did not prevent her from working," Swift offers the following denial:

. . . . The physical pain in Holly Swift's right arm and her inability to stretch out her right arm prevented her from getting to work and from performing her job duties. In order to perform her job, Holly Swift had to use her right arm to reach the buttons on her phone, use her computer mouse, type, reach her filing cabinet, and handwrite. Holly Swift's job required her to use the phone frequently, which required her to use her right arm frequently. Holly Swift's job requirements included mousing, clicking and pointing. Holly Swift could not stretch her arm out enough to use a computer mouse, type, reach her filing cabinet, or handwrite. Bank of America never offered Holly Swift the option of returning to work with accommodations that would allow her to perform her job duties even though she couldn't extend her right arm. Holly Swift also suffered from depression, anxiety and fatigue related to her Multiple Sclerosis that prevented her from performing her job duties.⁵

(PSMF ¶ 64 (citations omitted) & ¶ 336.) On three or four occasions, Swift did drive to the office to pick up her paycheck, though it made her uncomfortable to do so. Swift avers that these instances caused her severe pain, but that her dire financial situation motivated her to collect her

⁴ This assertion is highlighted in the introduction of Bank of America's motion for summary judgment: "Swift was cancer free following surgery on April 14, 2006, and her surgeon [Bermas] reported that she was ready to return to work four weeks later." (Def.'s Mot. at 1.) As the record reflects, Bermas did not report that Swift "was ready" to return four weeks later.

⁵ Only the fatigue is attributed to multiple sclerosis.

paychecks on these occasions.⁶ (DSMF ¶ 65; PSMF ¶¶ 65, 336.) She explains that driving for long periods was very painful and caused her to be in severe pain not only while she was driving, but also for 6-8 hours after she got home. (PSMF ¶ 333.) She states that driving from her home to Belfast on a daily basis would have caused her severe pain. On the occasions when she drove to Belfast to pick up her paycheck, when she arrived she was in too much pain to have performed her job duties. (Id. ¶ 336.)

Bank of America asserts that Jeffers concluded early in the summer of 2006 that Swift did not have an emotional or a psychological disability that would keep her out of work. (DSMF ¶ 131; Def.'s Mot. at 4.) The cited portions of the Jeffers deposition reflect that he did not regard her as having anger, irritability and anxiety issues that would keep her from work. (Jeffers Dep. at 34.) Depression was not mentioned and was not among the issues for which Jeffers was counseling Swift. Jeffers testified:

A. Swift was upset most of the time during that period of time.

Q. What do you mean?

A. She cried frequently. She did not show the irritability and anger that she had earlier in my contact with her, but she was frequently very fatigued, and she was often teary-eyed.

Q. But you thought she could work?

A. I thought that whether or not she could work was not something that I could decide because we had been treating anger and anxiety. The anxiety had diminished, and the anger had disappeared.

⁶ At some point Swift asked that her checks be mailed and the Bank arranged for them to be mailed automatically. (DRS ¶ 336.)

Q. Okay. Did you encourage her to go back, say, part time?

A. If she could.

Q. Okay.

A. That would not be my decision.

(Jeffers Dep. at 63.)

Nurse Waters questioned Swift (presumably in June) as to why she could not return to work prior to the reconstructive surgery and then take additional STD leave for her reconstructive surgery starting August 3. (DSMF ¶ 104.) Swift informed Waters that she still had discomfort in her arm following the surgery—that she was in severe pain—and she also talked to Waters about her lymphodema. (Id. ¶ 105.) On June 2 Dr. Merrill had observed possible early signs of lymphodema, an accumulation of fluid in the arm following breast cancer surgery. (Id. ¶ 78.) However, lymphodema was not identified in any COD issued by a health care provider in May, June or July of 2006.

Nurse Waters offers by way of affidavit that, on June 29, 2006, she presented Swift's STD case to the case review committee and expressed her concern that the documentation provided by Swift did not address any major post operative complications with her surgery. (Id. ¶ 107.) According to Nurse Waters, on that date the committee concluded that the documentation was insufficient and suspended Swift's STD leave effective July 1, 2006. (Id. ¶ 108.) Waters informed Swift that Dr. Flaherty's letters were not acceptable because they did not describe the disability, and that she could not be covered (on STD) if it was only a matter of discomfort. (Id. ¶ 109.) Bank of America placed Swift on unpaid leave of absence status as of July 2, 2006. (Id. ¶ 113.)

After the June 29 Case Review, Swift was allowed to present additional medical documentation to HSS to support continued STD leave. (Id. ¶ 114.) On June 30, Dr. Merrill sent a COD to HSS that indicated pain at surgical site, secondary depression and chronic anxiety pertaining to Swift's breast cancer diagnosis and double mastectomy, and an estimated return to work date in August 2006. (Id. ¶¶ 120-121, 124; PSMF ¶ 120; Waters Dep. Ex. 8, Doc. 75 at 37.) Concerning Swift's mental health symptoms stemming from the diagnosis and surgery, Dr. Merrill's plan of care at that point was to prescribe Zoloft, provide Swift with a list of therapists and see her in four weeks. (DSMF ¶ 123.) In addition to this COD from Dr. Merrill, on or about July 7, 2006, Dr. Flaherty completed and sent to HSS a COD, providing that Swift was having a second surgery on August 3, and that her estimated return to work date was August 21, 2006. (Id. ¶ 136.) Dr. Flaherty simply indicated bilateral mastectomies, tissue expander placements, and the forthcoming August 3 second reconstructive surgery as justification for being out of work with an estimated return date of August 21. (Id. ¶¶ 136-137; PSMF ¶ 137; Waters Dep. Ex. 9, Doc. 75 at 38.)

Dr. Flaherty testified that it is quite common for women with breast cancer to stay out of work during the entire period between a mastectomy and the follow-up reconstructive surgery, and that some of the factors that might cause someone to stay out of work between the two surgeries are psychological makeup and a history of depression. (PSMF ¶ 243.) Dr. Merrill testified that he felt it was appropriate for Swift to stay out of work until after her reconstructive surgery. (Id. ¶ 244.) His June 30 COD identified depression and chronic anxiety (in addition to pain) as causes for his conclusion that Swift needed to remain out of work.

Waters informed Swift that she would see if the July 7 COD from Dr. Flaherty (but not Dr. Merrill's COD) would cover her until the return date. (DSMF ¶ 141.) Waters acknowledged

at her deposition that she had a "feud" going with Dr. Merrill, stemming from some past issue or issues. (PSMF ¶ 26; Waters Dep. at 160.) On July 10 or 11, the Bank's personnel department, in the person of Joy Asuncion, and Swift's manager, Lisa Kelley, informed Swift that her job was in danger of being terminated if the July 7 COD from Dr. Flaherty did not cover her absence (again, there is an omission of Dr. Merrill's COD, as though it were irrelevant). (DSMF ¶¶ 6, 145.) Asuncion told Swift that her options were (1) to return with a release to work from a doctor; (2) use other paid time off (which was not available); (3) resign; or (4) be terminated based on job abandonment.⁷ (PSMF ¶ 254; Kelley Dep. at 85.) Swift stated that she would return to work rather than lose her employment, but Asuncion⁸ informed her that she needed a medical release allowing her to return to work before she could return. (DSMF ¶¶ 150-151, 153.) In another call later that day, Swift repeated her willingness and desire to return to work rather than be terminated and Waters reiterated the position taken by Asuncion that it was not an option unless Swift obtained a medical release. (Id. ¶¶ 152-153; PSMF ¶ 350.)

On July 13, 2006, HSS Case Review recommended not reinstating Swift's STD based on a conclusion that her medical documentation did not support additional STD time. (DSMF ¶ 158.) Waters referred the matter to Personnel for further action. (Id. ¶ 159.) On July 14, 2006, Asuncion and Kelley informed Swift of the decision to discontinue her STD and that, because she had no FMLA leave available and no available personal time off, her employment would be ended. (Id. ¶ 160.) The Bank did not advise Swift of the final decision to end her employment

⁷ Swift exhausted her FMLA leave on June 23, 2006, and by July 1, 2006, she had no more paid time off available such as vacation time or sick leave. (DSMF ¶ 110.) It was within the discretion of the managers and officers considering Swift's situation to place her on unpaid leave for a period of time. In fact, the Bank states that it did place Swift on unpaid leave, temporarily, starting July 2, 2006. (Id. ¶ 113.)

⁸ Swift attests that Waters was a party to this conversation, and she gives the date of July 11, 2006, rather than July 10 (PSMF ¶ 350), though she admits without qualification Bank of America's statement that Asuncion and Kelley spoke with her on July 10, and that there was a second conversation with Waters later that day. (DSMF ¶¶ 145, 152, 153.)

until Swift received the job abandonment termination letter dated July 26, 2006. (PSMF ¶ 161.) The Bank's personnel director, Mark Crosby, endorsed the decision to end Swift's employment. (DSMF ¶¶ 162, 165.) MBNA ended Swift's employment on July 26, 2006, coding her termination as "job abandonment." (Id. ¶ 167.) MBNA internally coded Swift as ineligible for rehire. (Id. ¶¶ 171, 267; PSMF ¶ 280.) In a letter sent to commemorate the event, it was stated that Swift's STD leave ended on July 1, 2006, but that her effective termination date was July 26, 2006. (DSMF ¶¶ 173-174.) Bank of America justifies its decision to terminate Swift's employment on the ground that Swift failed to provide adequate medical documentation to support her time away from work, did not come back to work, and had no family medical leave or personal time off available to her. It supports this statement with a citation to the deposition of Jay Fetterman, Bank of America's Rule 30(b)(6) deponent. (Id. ¶ 166.)

Four of Bank of America's key witnesses, Fetterman, Waters, Kelley and Asuncion, all conceded at their depositions that voluntary resignation is a preferable reason for separation from employment than job abandonment. All but Asuncion testified that they could recognize a negative connotation in the concept of job abandonment. (PSMF ¶ 265.) When employees are terminated on the basis of job abandonment, the Bank codes them as ineligible for rehire, which tends to reflect the negative connotation the Bank ascribes to job abandonment. (Id. ¶ 266.)

The Bank's written short term disability policy stated: "If HSS denies short-term disability benefits, the person may be transferred, if eligible, to some other form of paid or unpaid leave, such as Family and Medical leave, vacation, personal leave, or unused occasional absence. If the person has no available leave, he or she may be considered to have resigned employment." (Id. ¶ 169.) In addition to STD leave and FMLA leave, the Bank offered hardship leave, general leave and unpaid medical leave. (DSMF ¶ 177; PSMF ¶ 177.)

Employees were eligible to apply for hardship leave for an unpaid leave of absence for personal hardship or emergency. (DSMF ¶ 179.) General leave was available to employees who were in good standing for up to one year because of other compelling reasons. (Id. ¶ 180.) The Bank's policy required requests for hardship leave and general leave to be made in writing to, and be approved by, the employee's immediate manager, department manager and a personnel director or his or her designee. (Id. ¶ 182.) In general, hardship leave or general leave was not available to employees who still had STD available. (Id. ¶ 183; PSMF ¶ 252; Def.'s Mot. at 6.) At the time Swift's employment ended she had not exhausted the 26 weeks of STD leave allowed under the Bank's STD policy. (DSMF ¶ 184.) However, at the same time that Bank of America maintains that Swift was ineligible for unpaid leave because she was an employee "who had STD leave available to [her]" (DRS ¶ 252), Bank of America also maintains that Swift was no longer eligible for STD leave based on inadequacies in the CODs supplied by her doctors. In effect, a finder of fact viewing this record in the light most favorable to Swift might reasonably conclude that, if an employee's need for unpaid hardship or general leave stemmed from a condition that currently or formerly qualified for STD (disability) leave, the Bank would not, as a general practice, extend hardship or general unpaid leave to the employee after STD leave was exhausted or discontinued.⁹ (PSMF ¶¶ 252-253; DRS ¶¶ 252-253.)

The Bank's applicable policy defines "job abandonment" as a situation in which the employee "refuses to return to work and/or does not contact their manager for two or more

⁹ Bank of America appears to be of two minds on this issue. Elsewhere it states:

If an employee's STD benefits were denied by HSS, the employee was transferred to some other form of paid or unpaid leave, such as FMLA, vacation, personal leave, or unused occasional absence, and if no leave was available they were considered to have resigned employment.

(DSMF ¶ 34 (emphasis added).)

business days." Both Waters and Asuncion testified that Swift's circumstances did not fall into that category. (DSMF ¶ 257; Asuncion Dep. at 147-148; Waters Dep. at 122.)

Asuncion could not identify any undue hardship that would have befallen the Bank had it granted unpaid leave to Swift until August 21. (PSMF ¶ 254.) Swift's manager, Kelley, testified that there would not have been any hardship to the team that Swift was a part of if the Bank had continued Swift's leave through August 21. (Id.)

Shortly before her termination, Swift informed Kelley that she had a note from her doctor stating that she would be back in a couple of weeks and that she would be happy not to be paid in the interim as long as she could come back. (DSMF ¶ 185.) Kelley went to speak with someone and came back and informed Swift that they would not be able to do that. (Id. ¶ 186.) Asuncion never personally received a request from Swift for unpaid leave, though such a request was made of Kelley and Kelley did relay that request to someone who indicated that it was not an option. (Id. ¶ 187; PSMF ¶ 247.)

On August 3, 2006, Swift had the second part of her reconstructive surgery during which Dr. Flaherty removed the expanders and placed permanent gel implants. This procedure was a day surgery that did not require an overnight stay. (DSMF ¶¶ 190-91.)

Underlying conditions

In July 2001, Holly was diagnosed with multiple sclerosis. Her multiple sclerosis symptoms included debilitating fatigue and paralysis, numbness and tingling in her limbs. (PSMF ¶ 315.) Between March 2002 and June 2005, Swift sought brief and intermittent periods of STD and FMLA leave for fatigue related to her multiple sclerosis and for anxiety. (DSMF ¶ 12.) Swift maintains that underlying persistent fatigue from multiple sclerosis prolonged her recovery from her double mastectomy. (PSMF ¶ 317.) Swift also has a

history of depression and anxiety. (Id. ¶¶ 318-319.) Swift avers that her cancer diagnosis and surgery caused an acute flare up of these chronic mental health issues. (Id. ¶ 325.) Holly explained repeatedly to Waters that her recovery from the surgery was slow and that her underlying conditions, including her multiple sclerosis and chronic anxiety and depression, were contributing factors in her slow recovery. (Id. ¶ 330.)

Outstanding employee

In September 1999, Holly Swift received a highly favorable written performance evaluation for her first four months of employment. The evaluation stated in part that she had “exceeded the requirements of her position,” that she had “consistently outperformed her peers in productivity,” that she was “a positive role model for her peers and displays an energetic attitude,” and that she led “by example with her self-motivation and willingness to succeed.” Swift received performance evaluations giving her an overall rating of “Excellent,” “Superior,” or “Exceeds Expectations.” After fewer than two years of employment with Defendant, she was promoted from a 217-level position to a 218-level position. Swift was recognized as her department’s Iron Person in February 2001, and again in December 2001. In March 2001, Holly Swift received a performance evaluation stating in part that: “Holly exhibited excellent leadership . . . perfect attendance . . .” Swift was recognized as her department’s Most Valuable Player in February 2001, and again in November 2001. Swift was recognized as Camden Activation’s top performer in November and December 2001. In October 2001, Swift received a performance evaluation stating in part: “Demonstrated a strong work ethic – often working through days when not feeling well.” She was awarded certificates recognizing her as “Inward Top Performer” in February, April and November 2002 for her work in the Camden Activation Office. In September 2003, she received a performance evaluation stating in part: “Holly

consistently exceeded every performance objective.” In September 2004, she received a performance evaluation stating in part: “[A]chieved excellent results [W]orks diligently Holly is very enthusiastic and cares about her Customers as well as the goals we have set as a company.” In January 2005, she received a performance evaluation stating in part: “162 % of the opportunity goal, which was the 20th highest in the division. . . . Superior Efficiencies! . . . Achieved the highest % of opportunity goal on Team Kelley.” In March 2005, she received a performance evaluation stating in part:

Demonstrated and communicated pride and passion of [the Bank] to both her Customers and her peers consistently. Spoke up positively with much encouragement in team meetings and demonstrated a can-do attitude when her peers demonstrated negativity or push back. Demonstrated an attitude of graciousness toward her employment here at [the Bank] and reminded others what a great place to work it is.

In April 2005, Swift ranked “19 out of 1278 in the division for CRM products.” In May 2005, she received a performance evaluation stating in part: “Understands the importance of being a team player – continuously celebrates in Teammates successes. . . . Fantastic effort.” In September 2005, she received a performance evaluation stating in part: “Superior job with efficiencies Contagious positive attitude.” In October 2005, she received a performance evaluation stating in part: “Arrived to work every day with a positive ‘can do’ attitude and encouraged peers.” In March 2005, she received her final annual performance review, in which she was given the overall rating of “exceeds expectations.” Her reviewer wrote in part that she had “consistently exceeded expectations . . . demonstrated an attention to detail . . . communicated her pride and passion of [the Bank] to not only her Customers but to her peers on a consistent basis. . . . She demonstrated flexibility . . . with a ‘can-do’ or ‘bring it on’ attitude” and also praised her for having “perfect attendance.” Her reviewer, as well as a second level

manager and the director, all signed this evaluation. The director handwrote and initialed an additional comment on the evaluation that read: “Holly-You do such a great job! I love your positive attitude! Thank you so much for all your hard work and especially for having perfect attendance!” In April 2005, Holly received a promotion to senior telephone sales associate. (Id. ¶¶ 295-310.)

Food stamps and unemployment benefits

After her employment ended with the Bank, Swift applied for food stamps with the State of Maine’s Department of Health and Human Services. As part of Swift’s application for food stamps, the State of Maine’s Department of Health and Human Services requested that the Bank complete an application calling for wage information, dates of employment and the reason for leaving. On August 3, 2007, Danielle Merritt, a Bank of America payroll employee, completed the Department of Health and Human Services form and indicated that the reason for Swift leaving the company was “job abandonment.” (DSMF ¶¶ 221-223.) The form on which the Bank indicated “job abandonment” as the reason for leaving was signed by Swift in order to give permission to have the information disclosed to the Department (presumably, it was signed when it was a blank document). (PSMF ¶ 289; DRS ¶ 289.) Swift also sought unemployment benefits. Swift testified that the Department of Labor informed her that the Bank had indicated job abandonment to explain her separation from employment.¹⁰ (DSMF ¶ 225.)

¹⁰ When Swift offers her own statement about what someone at the Department of Labor told her, Bank of America moves to strike it as inadmissible hearsay. (PSMF ¶ 291; DRS ¶ 291.) On the other hand, Bank of America arguably introduced the evidence in its own statement. (DSMF ¶ 225.) I confess some confusion at this approach. At trial, Bank of America would likely succeed with a hearsay objection, assuming it did not somehow introduce the evidence while questioning the witness.

Job search

Swift began looking for a new job on August 22, 2006. (Id. ¶ 192.) Swift claims that she had difficulty finding a new job because she felt compelled to tell prospective employers that she was terminated from the Bank for “job abandonment,” knowing that the Bank had reported to state agencies that that was the reason for her termination. (Id. ¶ 193; PSMF ¶¶ 193, 291.) Swift applied online for a position with Home Depot and stated “job abandonment” as the reason for her separation from the Bank. (DSMF ¶ 200.) Additionally, Swift applied at the Dead River Company and disclosed at an interview that she was terminated for job abandonment when she was recovering from a double mastectomy for breast cancer. (Id. ¶¶ 202, 205.) Neither of these employers extended an offer to Swift. (Id. ¶¶ 201, 206.) Similarly, Swift applied for employment with MidCoast Federal Credit Union and stated her reason for leaving the Bank as “job abandonment due to health issues.” (Id. ¶ 207.) Swift did not receive an interview. (Id. ¶ 208.) In February 2007, Swift sought employment through Manpower, an employment agency. On Manpower’s pre-registration information sheet, used to determine if any assignments were available, Swift wrote that her job with the Bank ended because “cancer/short term disability ended was terminated.” Swift disclosed in her interview with Manpower that the reason she left the Bank was job abandonment, but provided her explanation that she did not really abandon her job, that she had breast cancer, and explained how difficult it was for her. (Id. ¶¶ 209-211.) Manpower hired Swift for an assembly line position at Tibbetts Industries in March 2007. Tibbetts Industries subsequently hired Swift for a full-time position in November or December 2007. (Id. ¶¶ 212-213.)

Administrative proceedings

In its submission to the Maine Human Rights Commission in relation to Swift's charge of discrimination, Bank of America represented that it had not terminated Swift's employment and that she "was considered a voluntary departure or 'job abandonment' for failure to produce the required documentation." (PSMF ¶ 273.) However, in the concluding paragraph of its submission, it did state that Swift was "terminated" for failure to supply appropriate documentation to support STD leave. (DRS ¶ 273.) Here, Bank of America acknowledges that it terminated Swift. (PSMF ¶ 274.) Bank of America also represented to the Commission that it "continues to consider [Swift] 'Eligible for Re-Hire'." (Id. ¶¶ 275, 282.) Here, Bank of America admits that Swift was never eligible for rehire. (Id. ¶ 276.)

MOTION FOR ORAL ARGUMENT OR FOR LEAVE TO FILE SURREPLY

Holly Swift has filed a motion for oral argument or, in the alternative, for leave to file a surreply brief. (Doc. 84/85.) That motion was not referred and remains pending because the briefing period has not yet elapsed. The motion can be handled in the context of any objection filed regarding this recommended decision.

SUMMARY JUDGMENT DISCUSSION

Swift alleges that Bank of America intentionally discriminated against her on account of her disabilities, in violation of the Maine Human Rights Act (MHRA), 5 M.R.S. §§ 4551-4634. (First Am. Compl. ¶ 78.) Swift advances three charges of discriminatory conduct: (1) discriminatory termination on specious grounds with an unduly harsh termination based on "job abandonment," which made Swift ineligible for rehire; (2) failure to accommodate; and (3) retaliation for requesting accommodation. (Pl.'s Objection at 1.) In addition, Swift maintains a second count for defamation, based on the "job abandonment" mark placed in her employment

record and the subsequent publication of the same. (Id.) Bank of America postulates that it is entitled to summary judgment against all claims as a matter of law.

A party moving for summary judgment is entitled to judgment in its favor 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 judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if its resolution would "affect the outcome of the suit under the governing law," and the dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). When reviewing the record for a genuine issue of material fact, the Court must view the summary judgment facts in the light most favorable to the nonmoving party and credit all favorable inferences that might reasonably be drawn from the facts without resort to speculation. P. R. Elec. Power Auth. v. Action Refund, 515 F.3d 57, 62 (1st Cir. 2008). If such facts and inferences could support a favorable verdict for the nonmoving party, then there is a trial-worthy controversy and summary judgment must be denied. Azimi v. Jordan's Meats, Inc., 456 F.3d 228, 241 (1st Cir. 2006).

A. Discrimination under the MHRA

There are three claims advanced under the MHRA: discriminatory termination, failure to accommodate and retaliation. Bank of America argues that there can be no claim of disability discrimination because Swift cannot show that she was disabled within the meaning of the MHRA, cannot show that she needed an accommodation, and cannot show that Bank of America's stated justification for sacking her is a pretext for discrimination or retaliation. (Def.'s Mot. at 14-20.) I address each claim in turn, starting, as the parties have, with the claim of

failure to accommodate. First, however, I discuss whether Holly Swift was disabled within the meaning of the MHRA.

1. Disability

Bank of America maintains that Swift was not disabled in July 2006 when it decided to terminate her for job abandonment. It says there was no existing physical condition at that time because lymphodema was not noted by her doctors, there was no infection, and her multiple sclerosis was not considered an aggravating factor by Swift's doctors. (Def.'s Mot. at 15-16.) As for mental disability, Bank of America argues that there is no evidence of any in the CODs and that Jeffers did not provide support for any leave beyond what was provided. (Id. at 16.) Whatever limitation may have existed, according to Bank of America, could not be regarded as a disability because there is no evidence of "substantial impairment." (Id., citing 5 M.R.S. § 4553-A(1)(A), (2)(B).)

In its current incarnation, the MHRA defines "physical or mental disability" to mean a physical or mental impairment that substantially limits one or more major life activities or that significantly impairs physical or mental health. 5 M.R.S. § 4553-A(1)(A). In addition, the MHRA specifies that certain conditions, illnesses or diseases are *per se* disabilities, including cancer, mastectomy, and multiple sclerosis. Id. § 4553-A(1)(B). "Under Maine law, the existence of a physical or mental disability is determined without regard to the ameliorative effects of mitigating measures such as medication." Id. § 4553-A(2)(A). In order for an impairment of physical or mental health to be regarded as significant, it must have "an actual or expected duration of more than 6 months and impair[] health to a significant extent as compared to what is ordinarily experienced in the general population." Id. § 4553-A(2)(B). Bank of

America argues that Swift may have been impaired, but that she was not disabled under the MHRA. (Def.'s Mot. at 16.)

Swift responds that the presently existing definition of disability in the MHRA does not apply to her because in July of 2006, when her claim accrued, the definition had not yet been enacted. (Pl.'s Obj. at 14-15.) The effective date of the amendment that resulted in the current definition of disability is June 21, 2007. Rooney v. Sprague Energy Corp., 519 F. Supp. 2d 131, 133 (D. Me. 2007). Swift argues that the proper definition is the one articulated by the Law Court in Whitney v. Wal-Mart Stores, Inc.:

[S]ection 4553(7-A) [formerly] define[d] physical or mental disability as:

[A]ny disability, infirmity, malformation, disfigurement, congenital defect or mental condition caused by bodily injury, accident, disease, birth defect, environmental conditions or illness, and includes the physical or mental condition of a person that constitutes a substantial disability as determined by a physician or, in the case of mental disability, by a psychiatrist or psychologist, as well as any other health or sensory impairment that requires special education, vocational rehabilitation or related services.

2006 ME 37, ¶ 14, 895 A.2d 309, 312-13 (quoting 5 M.R.S. § 4553(7-A) (2005)). The Law Court observed in Whitney that even a latent, asymptomatic spinal defect qualified as a disability under this definition and that there was no basis in Maine law to construe the then-existing language of the statute as imposing a "substantial limitation" requirement. Id., 2006 ME 37, ¶¶ 18-21, 895 A.2d at 313-14 (discussing Rozanski v. A-P-A Transport, Inc., 512 A.2d 335, 340 (Me. 1986)).

In Rooney, this Court concluded that the old law interpreted in Whitney applied where the plaintiff filed his action prior to the effective date of the amendment. 519 F. Supp. 2d at 135. The question here is whether the old law applies when the plaintiff's claim accrued while the old

law was in effect, even though suit was not filed until after the effective date of the amendment. Existing precedent demonstrate that the substantive law in effect at the time of the underlying events is the law that governs unless the amendment clearly calls for retroactive application. Greenval v. Me. Mut. Fire Ins. Co., 2001 ME 180, ¶ 7, 788 A.2d 165, 167 ("[A]ll statutes will be considered to have a prospective operation only, unless the legislative intent to the contrary is clearly expressed or necessarily implied from the language used."); Heber v. Lucerne-in-Maine Village Corp., 2000 ME 137, ¶¶ 10 & 12, 755 A.2d 1064, 1066-67 & n.4 ("At common law, an individual has a vested right in an accrued cause of action, and a subsequent statutory enactment cannot act to defeat retroactively such a cause of action."); Coates v. Maine Employment Sec. Comm'n, 406 A.2d 94, 96-97 (Me. 1979) (holding in the context of claim for unemployment benefits that an amendment to the applicable law did not apply to a claim for benefits filed after the amendment because that claim was based on a departure from work prior to the amendment's effective date); see also Provencher v. T&M Mortgage Solutions, Inc., No. 08-31-P-H, 2008 U.S. Dist. Lexis 47616, *21 n.5, 2008 WL 2447472, *7 n.5 (D. Me. June 18, 2008) (looking to date of underlying events rather than date claim was filed) (Mag. J. Rec. Dec., adopted by the Court in unpublished order).

This Court has observed with respect to the amendment of the MHRA's definition of disability that, "in its Emergency Clause, the Legislature expressly stated that this legislation takes effect when approved" and there is "no expression of a legislative intent to apply the new definition retroactively." Rooney, 519 F. Supp. 2d at 135 (internal quotation marks omitted). Because there is no expression of a legislative intent to apply the amendment retroactively, the applicable definition of disability is the one existing when Swift was discharged from employment.

Swift argues that her "breast cancer and chronic anxiety" are both "infirmities" and that her double mastectomy resulted in "a severe type of 'disfigurement'" under the 2006 language. (Pl.'s Obj. at 15-16.) She also maintains that the diagnoses reflected in the CODs provided by Dr. Merrill and Dr. Flaherty describe disabilities because they indicate "physical or mental condition[s] of a person that constitute[] a substantial disability as determined by a physician." (Id. at 16.)¹¹

Swift has made a sufficient showing to support a finding that the physical and mental consequences of her DCIS constituted disabilities protected by the MHRA. Whitney, 2006 ME 37, ¶ 24, 895 A.2d at 315 ("Under the first category, a person is covered if he or she has 'any disability, infirmity, malformation, disfigurement, congenital defect or mental condition caused by bodily injury, accident, disease, birth defect, environmental conditions or illness.'") (quoting Rozanski, 512 A.2d at 340, and 5 M.R.S.A. § 4553(7-A) (1979)).

2. *Failure to accommodate*

The MHRA provides that the failure to make a reasonable accommodation for a "qualified individual with a disability" and the denial of employment opportunities to disabled employees on the basis of a need for accommodation are both acts of discrimination unless the employer can demonstrate that the requested accommodation would impose an undue hardship on the employer. 5 M.R.S. § 4553(2)(E), (F). To succeed on a failure to accommodate claim, the plaintiff need not produce any evidence that the employer subjectively harbored discriminatory animus. Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 264 (1st Cir. 1999) (explaining that a failure to accommodate claim does not require a showing of a

¹¹ Swift also notes that, even under the current language, disability includes cancer and mastectomy. 5 M.R.S. § 4553-A(1)(B).

discriminatory animus and that "any failure to provide reasonable accommodations for a disability is necessarily 'because of a disability'"). There are three elements to this claim. First, the employee must qualify as disabled. Second, the employee must have been able to perform the essential functions of the job with or without reasonable accommodation. Third, the employer must have refused to extend the accommodation despite knowing of the disability and the request for the accommodation. Freadman v. Metro. Prop. & Cas. Ins. Co., 484 F.3d 91, 102 (1st Cir. 2007).

Bank of America does not suggest that any undue hardship would have befallen it had it afforded Swift unpaid leave during a period of disfigurement and infirmity resulting from DCIS and a double mastectomy. Instead, Bank of America argues that Swift's request for unpaid leave "was not tied to a current disability, as defined by the MHRA." (Def.'s Mot. at 15.) As of July 2006, says Bank of America, Swift "did not need that leave for a physical condition," because there were "no major complications" with her surgery so she should have been ready to return to work by June. (Id. at 16.) This entire line of argument relies on the notion that the current definition of disability applies in this case. (See id. at 16, relying on 5 M.R.S. § 4553-A(1)(A)(1) & (2)(B)). I have already concluded that Swift has produced sufficient evidence to support a finding of disfigurement and physical and mental infirmity occasioned by DCIS (cancer) and double mastectomy. Moreover, this line of argument effectively concedes that Bank of America understood that Swift was requesting (at the very least) unpaid leave until a few weeks after her reconstructive surgery was completed. The remaining question is whether roughly 7 weeks¹² of unpaid leave would have been a reasonable accommodation under the circumstances. Bank of

¹² This assumes an August 21 return date, as indicated by Dr. Flaherty in his last COD.

America does not argue that such leave would be unreasonable as a matter of law. On this record, it is appropriate that the finder of fact be given an opportunity to determine the reasonableness of the request as a factual matter. Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 647 (1st Cir. 2000).

3. *Discriminatory discharge*

Most of the elements of the discriminatory discharge claim have already been established. What remains is for Swift to generate a genuine issue whether Bank of America's decision to terminate her employment was motivated by discriminatory animus. Swift needs to demonstrate that there is sufficient evidence in the record of a subjective intention on the part of the relevant decision maker(s) to terminate her employment because of her disability. Tobin v. Liberty Mut. Ins. Co., 433 F.3d 100, 104 (1st Cir. 2005); Higgins v. New Balance Athletic Shoe, Inc., 21 F. Supp. 2d 66, 71 (D. Me. 1998). Swift argues that she has direct evidence of discriminatory motive because Bank of America has acknowledged that it terminated her for continuing to request leave, rather than persuading her doctors to change their recommendations or voluntarily resigning. I agree that a fact finder could conclude that Swift's persistent disabled status was the root cause of her termination. The basic upshot of this case is that Bank of America terminated Swift because, in its estimation, she presented only infirmities and no serious or substantial limitation. But if the finder of fact determines that those infirmities were disabilities under the old law, and that it would have been reasonable to accommodate them with additional leave (unpaid or STD), then it might also find that Bank of America terminated Swift because it concluded that Swift's (lesser) disabilities did not measure up. That is, after all, the basic premise of Bank of America's argument.

Assuming, however, that this evidence cannot be construed as direct evidence that Bank of America terminated Swift's employment because of her disabled status, this case should nevertheless go before the finder of fact based on circumstantial evidence. The ability of circumstantial evidence to demonstrate discriminatory motive is determined by resort to the McDonnell Douglas burden shifting methodology. Me. Human Rights Comm'n v. Auburn, 408 A.2d 1253, 1261-62 (1979) (discussing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)). First, Swift must demonstrate a *prima facie* causal connection between her disability and the termination. If she succeeds, the burden shifts to Bank of America to produce a legitimate, non-discriminatory justification for terminating Swift's employment. Tobin, 433 F.3d at 105. Thereafter, Swift must ultimately demonstrate that the justification offered by Bank of America is a pretext designed to mask discriminatory animus. Id.

Swift's presentation of her case satisfies the *prima facie* causation requirement. It was plainly Swift's request for additional leave on account of her disability and the prospect of any continued absence pending the final stage of reconstructive surgery for a double mastectomy that moved Bank of America to terminate Swift. Moreover, the record reflects that Bank of America did not consider Swift as eligible for an accommodation of unpaid leave because she would be transitioning from paid leave afforded on account of disability. These circumstances are sufficient to satisfy the "relatively light" *prima facie* burden. Mariani-Colon v. Dep't of Homeland Sec., 511 F.3d 216, 224 (1st Cir. 2007). Bank of America has not even argued that the *prima facie* burden cannot be met here. This shifts the burden to Bank of America to present a legitimate explanation.

According to Bank of America, it ended Swift's employment because "she failed to return to work and did not provide adequate documentation to support her continued time away on

medical leave." (Def.'s Mot. at 18.) Though Bank of America satisfies its McDonnell Douglas burden with this statement, which it supports with deposition testimony from its Rule 30(b)(6) designee, it seeks to further substantiate its justification by emphasizing that, as of July 2006, it had already afforded Swift "a generous amount of STD leave for her condition." (Id.) It also persists in the notion that Swift's physicians "released her to return to work," a proposition that the record tends more to refute than to support. (Id.) Bank of America also highlights that Waters gave Swift a little extra opportunity to submit additional documentation after July 1, 2006. (Id.) Finally, Bank of America argues that Swift could have returned to work because, if she had only represented to her doctors that she felt fine and ready to return, they would have acquiesced and released her to work. (Id. at 19.)

Concerning the adequacy of Swift's documentation, Dr. Merrill certified on June 30 that Swift was disabled due to pain at the surgical site, secondary depression and chronic anxiety pertaining to Swift's breast cancer diagnosis and double mastectomy, and he estimated a return to work date sometime in August 2006. Bank of America treated Dr. Merrill's COD as irrelevant, with Waters acknowledging that she had some kind of unrelated "feud" going with Dr. Merrill.¹³ Also in June, Dr. Flaherty certified that Swift should remain out of work for disability-related reasons because she was experiencing discomfort following recent surgery and was scheduled for a secondary procedure on August 3, 2006. Bank of America chose to focus entirely on Dr. Flaherty's vague reference to "discomfort" without considering at all Dr. Merrill's related reference to pain at the surgical site or depression secondary to the surgery. I am not persuaded

¹³ The applicable language of the MHRA did not state that a mental condition like depression arising from double mastectomy could not be diagnosed by a physician. Whitney, 2006 ME 37, ¶ 24, 895 A.2d at 315 ("Under the first category, a person is covered if he or she has 'any disability, infirmity, malformation, disfigurement, congenital defect or mental condition caused by bodily injury, accident, disease, birth defect, environmental conditions or illness.'")

that these CODs were insufficient, as a matter of law, to support a finding of disability under the MHRA when placed in the context of a double mastectomy recovery prior to the completion of reconstructive surgery that appears to have proceeded along an ordinary time table. Moreover, a fact finder could fairly disbelieve Bank of America's assertion that it regarded the CODs as inadequate when Bank of America discounted the certification of the physician concerned with Swift's overall, general care, as compared with a plastic surgeon focused on a singular procedure.¹⁴

As for the contention that Swift failed or refused to return to work, because the finder of fact could reasonably conclude that Swift was disabled under the MHRA and did present a reasonable case for continued leave, the finder of fact might well reject this justification as well. On this point Swift argues that Bank of America did not actually apply its policy concerning job abandonment. (Pl.'s Obj. at 19.) The job abandonment policy was written in terms that would fit only an employee who refused to return to work. At the same time, the applicable STD leave policy stated that a person failing to return to work following the denial of STD benefits "may be considered to have resigned." Here, a finder of fact could fairly conclude that Swift did not "refuse" to return. The finder of fact might also conclude that there was a failure to accommodate and that Swift would have returned had she been afforded a reasonable accommodation of continued leave through August 21. The finder of fact might also entertain circumstantial evidence of bias consisting of the fact that Waters, in the preceding years of 2002-2005, was consistently evaluated in terms of her ability to control costs related to disability leave; that Bank of America chose to classify Swift as someone who abandoned her job, when

¹⁴ This claim is not ultimately about Swift's compliance with the Bank's STD policy. It is about whether Bank of America complied with the MHRA in relation to a request for accommodation and its related decision to terminate Swift for job abandonment.

the STD policy language left leeway to classify Swift as voluntarily resigned; that use of the job abandonment label precluded Swift (an employee with a history of more than one disability) from returning to Bank of America's employment rolls (despite an exemplary performance record); and that Bank of America misrepresented to the Maine Human Rights Commission the fact that it had marked Swift as ineligible for rehire. I conclude that the combined facts and circumstances are sufficient to generate a genuine issue on the existence of discriminatory motive and preclude judgment as a matter of law.

4. *Retaliation*

"Retaliation is prohibited under the MHRA whenever an 'individual has opposed any act or practice that is unlawful under [the MHRA] or because that individual made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under [the MHRA].'" Doyle v. Dep't of Human Serv., 2003 ME 61, ¶ 20, 824 A.2d 48, 55 (quoting 5 M.R.S.A. § 4633(1) (2002)).

Swift's retaliation claim is like her discriminatory discharge claim, except that the third element requires her to demonstrate that her termination was motivated by a desire to retaliate against her participation in protected activity rather than a desire to cashier her because she was a disabled employee. Id. at 55-56. Bank of America contends that this claim is dead in the water because "termination was discussed with Swift for failing to provide documentation supporting her leave well before she engaged in the protected activity." (Def.'s Mot. at 20.) Otherwise, Bank of America relies on the same evidence and arguments concerning its non-discriminatory justification and Swift's ultimate burden. Bank of America does not contend that Swift's request for unpaid leave was not protected activity under the MHRA. Its argument proceeds from the position that such a request for leave is protected activity, but it characterizes the protected

activity very narrowly as Swift's request for *unpaid* leave, seeking to excise Swift's related efforts to remain on STD leave. The difficulty with this argument, in my view, is that Bank of America fails to explain why Swift's overall effort to obtain leave and remain on leave should not be viewed as one extended campaign of protected activity. Because I am unaware of a legal rule that would justify treating Swift's last-ditch plea for unpaid leave as an isolated incidence of protected activity having no relationship to her earlier efforts to accommodate her disability through FMLA leave or the STD policy, I reject the argument that causation cannot be demonstrated. Bayonne v. Pitney Bowes, Inc., No. 3:03cv712, 2004 U.S. Dist. Lexis 1379, *5-6, 2004 WL 213168, *2 (D. Conn. Jan. 27, 2004) (holding in context of a motion to dismiss that employee's request for short-term disability benefits to obtain leave was a sufficient allegation of protected activity in the form of a request for accommodation). Swift succeeds in carrying her burdens related to causation and pretext for the reasons identified in the previous section of this discussion. Whether styled as discriminatory discharge or retaliatory discharge, there is a genuine issue of fact whether Bank of America terminated Swift because she persisted in seeking accommodation for a disability.

B. Defamation

Swift alleges the following second claim in her complaint:

[T]he defendant has negligently published and forced Ms. Swift to publish false statements defaming her business, occupational and professional fitness, including statements that her conduct, characteristics or condition were incompatible with the proper conduct of her occupation and that she was discharged for reasons relating to her lack of fitness as a good worker. . . .

(First Am. Compl. ¶ 81 ("second claim").) Swift's summary judgment objection relates that her defamation claim is premised on publication of the fact that Bank of America marked her as someone who had abandoned her job. The record contains two categories of allegedly

defamatory statements concerning job abandonment. First, there is Bank of America's publication to the Department of Health and Human Services.¹⁵ Second, there is Swift's compelled self-publication¹⁶ to prospective employers, when asked, that the Bank would give job abandonment as the reason for her separation from employment.

The elements of defamation are (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. Cole v. Chandler, 2000 ME 104, ¶ 5, 752 A.2d 1189, 1193. As for the fourth element, "words written falsely about a person's profession, occupation, or official station constitute libel *per se*." Id.

Bank of America argues that it is entitled to summary judgment on this claim because its act of "coding" Swift's termination as job abandonment was in keeping with its *unwritten* "medical job abandonment policy" and, therefore, any subsequent statement about its coding decision must be "true."¹⁷ (Def.'s Mot. at 9; Def.'s Reply at 1-2.) Bank of America also argues that the job abandonment label "is not capable of having a defamatory meaning." (Def.'s Mot. at 13.) Should these points fail, Bank of America argues that Swift can demonstrate neither publication outside of privileged channels nor fault rising to the level of negligence. (Def.'s Mot. at 10, 14.) In my estimation, these arguments do not warrant an entry of summary judgment.

¹⁵ I leave off the alleged communication to the Department of Labor, but if such evidence is introduced at trial, it will merit the same analysis.

¹⁶ "Compelled self-publication" occurs when the defamed person is forced into a position of publishing a defamatory statement about himself or herself. See Gomes v. Univ. of Me. Sys., 365 F. Supp. 2d 6, 46 (D. Me. 2005); Carey v. Mount Desert Island Hosp., 910 F. Supp. 7, 11-12 (D. Me. 1995).

¹⁷ Bank of America does not argue that it was merely expressing its opinion of the situation.

1. False and defamatory statements

Swift argues that any publication to the effect that she abandoned her job can fairly be regarded as false because she did not actually refuse to return to work and because both Waters and Asuncion allowed that her circumstances did not really fit the definition of job abandonment set forth in the job abandonment policy. (Pl.'s Obj. at 9.) I agree with Swift for reasons stated in connection with the MHRA claim that there is a genuine issue whether or not she abandoned her job. Contrary to what Bank of America suggests, the question is not whether Bank of America (or Swift) truthfully reported Bank of America's reason for terminating Swift, but whether the reason itself was true. The finder of fact could conclude that it was false to describe Swift as an employee who "abandoned" her job.

As for whether "job abandonment" is defamatory, a defamatory statement is one that would lower the community's estimation of the plaintiff. Ballard v. Wagner, 2005 ME 86, ¶ 10, 877 A.2d 1083, 1087. Swift argues that the defamatory quality of the job abandonment label is reflected in, among other things, the fact that Bank of America bars employees deemed to have abandoned their jobs from ever working for it again. Swift also observes that Fetterman, Waters, and Kelley all acknowledged the negative connotation that the label conveys. (Pl.'s Obj. at 10.) I find that the job abandonment label is defamatory because it would tend to lower the community's estimation of Swift as compared with a statement that she resigned or even a statement to the effect that she was discharged. Unlike those alternatives, either of which could have been used by Bank of America and neither of which necessarily bears any negative connotation, the choice of "job abandonment" communicates that Swift is not a reliable or loyal employee. Picard v. Brennan, 307 A.2d 833, 835 (Me. 1973) (observing that there is "general

recognition that it is the reason for discharge rather than the discharge alone which can render the statement slanderous *per se*").

2. *Fault, conditional privilege, and abuse of privilege*

The third element of the tort of defamation requires proof of "fault amounting at least to negligence on the part of the publisher." Cole, 2000 ME 104, ¶ 5, 752 A.2d at 1193. Bank of America argues that its decision to code Swift's termination as job abandonment was not a negligent act. (Def.'s Mot. at 14.) For reasons already discussed, there is a genuine issue whether Swift's termination and the related job abandonment justification were products of discriminatory animus. If that question is decided in Swift's favor, then the finder of fact could also fairly conclude that publication of the job abandonment justification was the product of fault amounting at least to negligence. The same analysis extends to the matter of privilege. Here, Swift concedes for present purposes that a conditional privilege applied to all of the defamatory statements at issue in this summary judgment contest.¹⁸ (Pl.'s Obj. at 10.) Swift argues, however, that the privilege was abused. (Id. at 11.) Even when a conditional privilege applies, the defendant remains liable if he or she "knows [the] statement to be false, recklessly disregards its truth or falsity, or acts with spite or ill will." Once again, the finder of fact could conclude that Bank of America's decision to place the job abandonment label in Swift's employment record was a result of an employment decision motivated by discriminatory animus. Should the finder of fact draw that conclusion, then it might reason, by extension, that the subsequent

¹⁸ See Cole v. Chandler, 2000 ME 104, ¶ 6, 752 A.2d 1189, 1193-94 (holding that "Mead was entitled to a conditional privilege . . . against a claim of slander brought by one of its employees arising out of the termination of his employment relationship with Mead"); Rippett v. Bemis, 672 A.2d 82, 86 (Me. 1996) ("A conditional privilege may arise in any situation in which an important interest of the recipient of a defamatory statement will be advanced by frank communication.").

publication of that defamatory statement abused any conditional privilege because Bank of America knew the statement was false.

CONCLUSION

For the reasons set forth above, I RECOMMEND that the Court DENY Bank of America's Motion for Summary Judgment (Doc. 27) due to the existence of genuine issues of material fact.

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, and request for oral argument before the district judge, if any is sought, within ten (10) days of being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge 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.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

March 16, 2009

SWIFT v. BANK OF AMERICA

Assigned to: JUDGE JOHN A. WOODCOCK, JR

Referred to: MAGISTRATE JUDGE MARGARET J.

KRAVCHUK

Cause: 28:1332 Diversity-Employment Discrimination

Date Filed: 01/31/2008

Jury Demand: Plaintiff

Nature of Suit: 442 Civil Rights: Jobs

Jurisdiction: Diversity

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