

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

JOANNE DIDONNA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 02-132-B-W
	)	
WAL-MART STORES,	)	
	)	
Defendant.	)	

**ORDER ON DEFENDANT’S  
MOTION FOR SUMMARY JUDGMENT**

Plaintiff Joanne DiDonna initiated a cause of action against Defendant Wal-Mart, alleging it failed either to accommodate her disability or to hire and/or transfer her due to her disability in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-102 and the Maine Human Rights Act (MHRA), 5 M.R.S.A. §§ 4551-55. Ms. DiDonna sought redress from the Maine Human Rights Commission and from the Equal Employment Opportunity Commission. The Maine Human Rights Commission referred the matter to private counsel for litigation and the Equal Employment Opportunity Commission issued a right to sue letter. Defendant Wal-Mart has denied the Plaintiff’s allegations and has filed a motion for summary judgment. Plaintiff DiDonna has objected to the Defendant’s motion for summary judgment.

**I. Standard of Review.**

Summary judgment is appropriate when the record demonstrates there is no genuine issue as to any material fact and the moving party is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56(c). The trial court is obligated to “view

the entire record in the light most hospitable to the party opposing summary judgment, indulging all reasonable inferences in that party's favor." *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990). As this Court has said, in a discrimination action "caution is appropriate when considering summary judgment for an employer." *Bilodeau v. Mega Indus.*, 50 F. Supp.2d 27, 54 (D.Me. 1999). The Plaintiff has asserted claims under both the ADA and its state law analog, the MHRA.

## **II. Background.**

Consistent with the "conventional summary judgment praxis," this Court recounts the facts in a light most favorable to Ms. DiDonna's theory of the case, consistent with record support. *Gillen v. Fallon Ambulance Serv.*, 283 F.3d 11, 16 (1st Cir. 2002). The Court has relied on the uncontested facts or on Ms. DiDonna's version, if in conflict. Joanne DiDonna is forty-six years old and lives in Wilton, Maine. Ms. DiDonna has been diagnosed with a medical condition known as Fascio Scapulohumeral Dystrophy (FSH). FSH is a subset of muscular dystrophy; it is a progressive, degenerative condition for which there is no known treatment or cure. The symptoms of FSH, as the medical terminology implies, include generalized muscular weakness. Ms. DiDonna's mother and maternal grandmother had FSH; a positive family history is a risk factor for the development of the disease. Both Ms. DiDonna's grandfather and her mother experienced symptoms of muscular weakness and fatigue, difficulty standing, walking, and lifting their arms, and dizziness. Ms. DiDonna has long been aware of their diagnosis, of the symptoms they suffered, and of her enhanced familial risk. She has also known that there is no treatment or cure for FSH.

The Wal-Mart in Farmington, Maine, hired Ms. DiDonna on January 9, 1993, initially as a part-time Universal Product Code (UPC) associate. Her application dated December 19, 1992, represented that she was in good health. Wal-Mart considered Ms. DiDonna to be a good employee and she later became a full time UPC Associate.

Although there is some indication that Ms. DiDonna had been experiencing some FSH-like symptoms before 1997, it was in 1997 that she began to develop increased muscle weakness in her legs and a waddling gait, symptoms characteristic of FSH. Her leg weakness was particularly noticeable with certain activities, such as when she was required to crawl on the floor to repair registers. As time went on, her condition gradually worsened. Between 1998 and 1999, she experienced increased muscle weakness in legs, a decreased range of motion in her shoulders and arms, and a lessened ability to remain standing or walking.

By year 2000, her condition had further deteriorated. She had difficulty walking or standing for more than fifteen minutes without increased weakness or pain, her legs would give out and she would go down, and she was having dizzy spells as well as extreme fatigue. She also was unable to raise her arms above chest height and/or over her head. She failed, however, to go to a doctor for these symptoms, because she realized she likely had muscular dystrophy and knew she would simply have to live with the condition.

During the year 2000, Wal-Mart announced that it was consolidating two positions in the Farmington and other Maine stores: the UPC Associate position and the Invoicing Clerk position. The result was a position called a “back office position.” Ms.

DiDonna had held the UPC Associate position; Norma Lavoie, who is not disabled, had held the Invoicing Clerk position.

Franklin Pushard was the store manager at the Farmington Wal-Mart; he was the individual who decided Ms. Lavoie not Ms. DiDonna would be retained in the consolidated back office position. Ms. DiDonna recalls when Mr. Pushard informed her of the consolidation in August 2000, she not only expressed an interest in the back office position, but also informed Mr. Pushard that the position would match her experience and physical capacities. Ms. DiDonna viewed the back office position as an open one and thought both Ms. Lavoie and she were being considered to fill it. She now claims Wal-Mart's explanation of its placement of Ms. Lavoie in the position is pre-textual.

Mr. Pushard was aware in September 2000 that Ms. DiDonna had complained of some physical problems, including difficulty standing, weakness of her knees, muscular weakness, and limitations on walking and reaching overhead. Wal-Mart had an internal policy in place that gave priority consideration for all open positions to any Associate who had a disability as defined by the ADA. Mr. Pushard did not apply the priority policy to Ms. DiDonna in filling the back office position, despite the fact the position was an "open position" within the meaning of the policy. Joanne DiDonna and Norma Lavoie were equally qualified for the consolidated back office position.

On September 5, 2000, Frank Pushard told Joanne DiDonna he had selected Norma Lavoie for the consolidated back office position. Following his decision, Mr. Pushard and Ms. DiDonna explored other positions at Wal-Mart. Positions such as full-time cashier, accounting office, ICS team leader, and soft-line processing were discussed. On September 5, 2000, Mr. Pushard recommended to Ms. DiDonna that she should

accept a new position called ICS Team Leader and suggested that Wal-Mart would be able to work around her physical limitations. After consulting other managers, however, Mr. Pushard informed Ms. DiDonna he did not think she would be physically able to do the job, since it involved stocking.

On September 5, 2000, he also suggested the part-time cash office and part-time layaway positions. But, Ms. DiDonna, who had done the layaway position previously, thought she could not physically perform the job on a regular basis. Mr. Pushard offered Ms. DiDonna a full-time cashier position, a full-time soft lines processing position, and a combination part-time sales associate position and part-time fitting position. He also inquired whether she was interested in going into management. Ms. DiDonna states she would not have been able to perform the jobs even with accommodations and she informed Mr. Pushard she could not take any of these positions.

Ms. DiDonna's status at Wal-Mart came to a head on September 13, 2000. Ms. DiDonna met with members of Wal-Mart management, including Mr. Pushard, Lesa Delaney, Personnel Manager, and Wendy Younk, Associate Manager. At that point, Ms. DiDonna was still employed as a UPC Associate at Wal-Mart, but had been informed the position would be eliminated thirty days from September 5, 2000. At the September 13, 2000, meeting, Mr. Pushard pressed Ms. DiDonna to make a decision concerning employment. He also brought up the conduct of Ms. DiDonna's husband. Ms. DiDonna's husband had driven into the Wal-Mart parking lot and had slowed down next to Ms. Lavoie, frightening her. Mr. Pushard warned Ms. DiDonna he could not allow her husband's conduct to continue. Ms. DiDonna replied she did not know what to do about her husband, acknowledged he was disabled from a head injury, and admitted he was "a

psycho.” Ms. DiDonna became extremely upset, crying uncontrollably and shaking. At this point, Ms. Delaney, asked Ms. DiDonna if she could contact crisis intervention for her and Ms. DiDonna agreed. Ms. Delaney then drove Ms. DiDonna to Evergreen Behavioral Services and later to the Emergency Room of a local hospital. Ms. DiDonna was subsequently transferred to another hospital, where she remained as an inpatient for a week and a half.

Upon her discharge from the hospital, Ms. DiDonna went to her physician, Dr. Paul Taylor, and presented him with a Wal-Mart leave of absence form. Dr. Taylor signed the leave of absence form, listing Ms. DiDonna’s condition as depression and muscular dystrophy; he also referred her to the Eastern Maine Medical Center’s Muscular Dystrophy Clinic. The leave of absence form signed by Ms. DiDonna on September 27, 2000, contained a return to work date of October 23, 2000, and was approved by Mr. Pushard. On October 20 or 21, 2000, Ms. DiDonna wrote a letter to Mr. Pushard informing him she would no longer be working for Wal-Mart, because she could not do any of the jobs and no accommodations had been offered. She attended a job exit interview and confirmed to Lesa Delaney she was leaving voluntarily due to health reasons. On either October 26, 2000 or October 27, 2000, Ms. DiDonna applied for social security disability on the ground that she was unable to work; she was awarded social security disability benefits effective April 2001.

### **III. Discussion.**

To establish a claim of disability discrimination under the ADA, a plaintiff must prove three things by a preponderance of the evidence: first, she was disabled within the meaning of the Act; second, with or without reasonable accommodation, she was able to

perform the essential functions of the job; and, third, the employer discharged her because of her disability. *Bilodeau*, 50 F.Supp. at 33. A plaintiff can prove her case by “using the prima facie case and burden shifting methods that originated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973).” *Jacques v. Clean-Up Group, Inc.*, 96 F.3d 506, 511 (1st Cir. 1996).

Tracking the *McDonnell Douglas* holding, the First Circuit has set forth the analytic framework to evaluate the merits of an ADA claim. The court must ask three questions: 1) Did the claimant have a disability? 2) Was the claimant an otherwise qualified individual? 3) Did the employer discriminate against the claimant on the basis of that disability? *Gillen*, 283 F.3d at 12; *Lauren v. Providence Hosp.*, 150 F.3d 52, 56 (1st Cir. 1998). Because both the ADA and the MHRA have the same general purpose and Maine courts have consistently looked to federal law in interpreting state antidiscrimination statutes, the Court will focus on the ADA and its implementing regulations. *Bilodeau*, 50 F.Supp.2d at 11; *Soileau v. Guilford of Maine, Inc.*, 928 F.Supp. 37, 45 (D.Me. 1996) *aff’d* 105 F.3d 12 (1st Cir. 1997). Its analysis applies with equal force to the Plaintiff’s MHRA claim. *Pouliot v. Town of Fairfield*, 226 F. Supp.2d 233, 244 (D.Me. 2002); *Bailey v. Georgia-Pacific Corp.*, 176 F. Supp. 2d 3, 11 (D.Me. 2001); *Bowen v. Dep’t of Human Serv.*, 606 A.2d 1051, 1053 (Me. 1992).

**A. Whether Joanne DiDonna Was A “Qualified Individual With A Disability” At The Time She Was Employed At Wal-Mart.**

Wal-Mart first contends it is entitled to summary judgment because Ms. DiDonna does not meet the statutory definition of “disability” under the ADA. 42 U.S.C. Section 12102(2). The ADA defines “disability” in the following way:

The term “disability” means, with respect to an individual—

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such impairment; or,
- (C) being regarded as having such an impairment.

42 U.S.C. Section 12102(2). The statute goes on to define a “qualified individual with a disability” as “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that the individual holds or desires.” 42 U.S.C. Section 12111(8).

Conceding Ms. DiDonna later became disabled, Wal-Mart asserts there is no genuine issue of material fact as to whether Ms. DiDonna was disabled within the meaning of the ADA at the time it failed to transfer or hire her. Wal-Mart correctly points out that the critical time to determine whether the plaintiff is a qualified individual is the time of the adverse employment action. *Griffith v. Wal-Mart Stores, Inc.*, 135 F.3d 376, 380 (6th Cir. 1999), *cert. denied* Wal-Mart Stores, Inc. v. Griffith, 526 U.S. 1144 (*Kocsis v. Multi-Care Mgmt.*, 97 F.3d 876, 884 (6th Cir. 1996); *Parker v. Metropolitan Life Ins. Co.*, 875 F.Supp. 1321, 1326 n.5 (W.D. Tenn. 1995) (citing legislative history). Wal-Mart maintains even if Ms. DiDonna had certain physical ailments in September and October 2000, she was not substantially limited in one or more major life activity as required by the Act as of the date of the adverse employment action.

In *Gillen v. Fallon Ambulance Serv.*, 283 F.3d 11, 14 (1st Cir. 2002), the First Circuit noted that the term, “disability” is a “term of art in the ADA context”; the *Gillen* court referred to EEOC regulations, stating that the regulatory definitions “advance our analysis.” In *Gillen*, the court pointed out that the EEOC defined “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, leaning, and working” as constituting major life activities. *Gillen* at 13-14

*citing* 29 C.F.R. Section 1630.2(i). Further, the *Gillen* court went on to note that “sitting, standing, reaching and lifting” have been “added to the roster of likely major life activities.” *Id.* at 15 *citing* 29 C.F.R. Section 1630, App. Section 1630.2(i). The *Gillen* Court cited the EEOC definition of “substantially limits” as follows:

- i) Unable to perform a major life activity that the average person in the general population can perform; or,
- ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1). The EEOC analysis approved in *Gillen* recommends an analysis of “the nature and severity of the impairment, its expected duration, and its permanent or long term impact.” *Id.* at 15 (*citing* 29 C.F.R. § 1630.2(j)(1)).

Under *Gillen*, Plaintiff DiDonna has raised a genuine issue of material fact on this issue. The medical evidence establishes that FSH is a progressive disease and that it is unlikely the symptoms would have been acute in onset. When Dr. Amato examined Ms. DiDonna at the Eastern Maine Medical Center on September 26, 2000, he found she exhibited a clumsy tandem walk, a waddling gait, and pelvic weakness. 29 C.F.R. § 1630.2(i); *PGA Tour v. Martin*, 532 U.S. 661, 668 (2001) (walking is a major life activity). She was also complaining of weakness in her arms and legs, fatigue, frequent tripping and falling, an inability to lift either arm above shoulder level, an inability to walk more than fifteen minutes, an inability to stand more than fifteen minutes, and difficulty walking up stairs. *Gillen*, 283 F.3d at 16 (“lifting is a major life activity”).

Just one of these conditions with its restrictions could constitute sufficient evidence to withstand summary judgment; however, the cumulative impact of these

separate restrictions makes it clear there is medical evidence from which a fact finder could determine Ms. DiDonna suffered a substantial impairment of a major life activity in late September 2000. It is also a reasonable inference, given the medical evidence of the progressive nature of Ms. DiDonna's condition and the severity of her symptoms in late September 2000, that these impairments were present in early September 2000 when the adverse employment action was taken.

**B. Whether Joanne DiDonna Either Had A Record Of Impairment Or Was Regarded As Having An Impairment.**

Wal-Mart next contends, even if Ms. DiDonna had a substantial impairment of a major life activity at the time of the adverse employment action, she did not have a record of having such an impairment, 42 U.S.C. § 12102(2)(B); 29 C.F.R. § 1630.2(k), and was not regarded as having such an impairment. 42 U.S.C. § 12102(2)(C); 29 C.F.R. § 1630.2(l). *See Lyons v. Louisiana Pacific Corp.*, 217 F.Supp.2d 171, 178-79 (D. Me. 2002). In *Clemente v. Executive Airlines, Inc.*, 213 F.3d 25, 33 (1st Cir. 2000), the First Circuit stated that “to have a record of such an impairment, a plaintiff must have a history of, of been misclassified as having, an impairment that substantially limited a major life activity.” Under EEOC regulations, an individual is regarded as having such an impairment if she:

- 1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
- 2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such an impairment;
- 3) Has (no physical or mental impairment within the meaning of the regulations) but is treated by a covered entity as having a substantially limiting impairment.

*Santiago Clemente*, 213 F.3d at 33 (citing 29 C.F.R. § 1630.2(l)).

The evidence presents a genuine issue of material fact on these issues. Ms. DiDonna told Mr. Pushard during a conversation in May or June 2000, she had a degenerative and hereditary muscle disease that was progressive in nature. She informed Mr. Pushard she was unable to be on her feet for long periods of time, because her legs would go out from under her and it would take a long time for her to get them back. As a consequence of her limitations, Wal-Mart accommodated Ms. DiDonna. Wal-Mart had allowed her to use a stool in soft line processing and in the fitting room. It had stopped requiring her to fill in on cash registers and had lengthened the time she was allowed to perform floor inventory. *Webber v. International Paper Co.*, 239 F.Supp.2d 88, 99 (D.Me. 2002) (“The fact that International Paper extended to Webber accommodations of this sort is sufficient to generate a genuine factual issue on the question of whether International Paper regarded Webber as substantially limited in the major life activities”). Furthermore, immediately after declining to hire her in the back office position, Mr. Pushard first made and then retracted a job offer as ICS Team Leader on the ground she would be unable to physically perform all aspects of the position. Plaintiff DiDonna has presented sufficient evidence to survive Wal-Mart’s Motion for Summary Judgment on this issue.

**C. Whether Wal-Mart Failed To Hire Or Transfer Ms. DiDonna.**

Wal-Mart next asserts Ms. DiDonna has failed to provide evidence that “a vacant position exist(ed).” *See Feliciano v. Rhode Island*, 160 F.3d 780, 786 (1st Cir. 1998). Wal-Mart properly notes it is not required to change or eliminate any essential function of a job, shift any essential functions of a job to others, or create a new position for a disabled employee. *Phelps v. Optima Health, Inc.*, 251 F.3d 21, 26-27 (1st Cir. 2001).

Wal-Mart contends it merely reassigned a limited number of job duties from the UPC position to Ms. Lavoie and in essence, Ms. DiDonna was seeking to oust Ms. Lavoie from her job, the duties of which had been slightly enhanced.

Whether there was a vacant position or Ms. Lavoie's old position was simply enhanced generates a genuine issue of material fact. Ms. DiDonna has stated Mr. Pushard had informed her in early August there was going to be a new position. Wal-Mart itself asserts that on September 5, 2000, Mr. Pushard "informed Mrs. DiDonna that the UPC Associate and the Invoice Associate positions would be consolidated in thirty days and that Mrs. Lavoie was selected to do the invoice associate position." Def.'s SMF at 52. It is, of course, curious Wal-Mart would "select" Ms. Lavoie for a position she already had.

However, it is not necessary to parse Defendant's statements to conclude a genuine issue of material fact exists on this point. Wal-Mart had fifteen stores in the State of Maine that underwent a consolidation of the UPC and Invoice Associate positions. In five of the fifteen stores, it was the UPC Associate, not the Invoice Associate, who received the consolidated position. If in fact the new position was not open, it is at least arguably odd that if she had been employed in one-third of the other stores in Maine, Ms. DiDonna, not Ms. Lavoie, would have assumed the consolidated position. Based on the record before the court, the Plaintiff has raised a genuine issue of material fact on the question of whether there was a vacant position into which Wal-Mart failed to hire or transfer her.

**D. Whether Wal-Mart Failed To Provide Reasonable Accommodation To Ms. DiDonna and Constructively Discharged Her.**

Wal-Mart next asserts it is entitled to summary judgment in its favor, because it attempted to provide reasonable accommodation to Ms. DiDonna in other positions after it retained Ms. Lavoie in the consolidated position. Wal-Mart argues its obligation to engage in reasonable accommodation ended when Ms. DiDonna voluntarily quit employment, thereby terminating the “interactive process” that would have, in Wal-Mart’s view, led to placing Ms. DiDonna in a new position. *See* 29 C.F.R. § 1630.2(o)(3) (“To determine the appropriate reasonable accommodation, it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability . . . .”); *Beck v. University of Wisconsin Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996) (“A party that obstructs or delays the interactive process is not acting in good faith”).

Ms. DiDonna disputes Wal-Mart’s contentions. Ms. DiDonna first contends it was Wal-Mart’s failure to comply with its own internal policy and its failure to place her in the consolidated position that stopped the “interactive process.” She then notes it was Wal-Mart, through Mr. Pushard, that first offered and then retracted the ICS Team Leader position. Finally, she asserts that she was unable to perform the remaining positions Wal-Mart offered, that Wal-Mart knew she could not perform them, and that Wal-Mart failed to offer reasonable accommodations to allow her to perform the proffered work. Ultimately, she claims that Wal-Mart demanded she elect between two jobs, neither of which she could perform, failed to offer reasonable accommodations for these positions, and finally caused her to break down and require hospitalization. Ms. DiDonna says she had “no choice but to resign,” a “constructive discharge” argument. *See Serrano-Cruz v*

*DFI Puerto Rico*, 109 F.3d 23, 26-28 (1st Cir. 1997). By the time Ms. DiDonna's leave of absence expired on October 23, 2000, her old job of UPC Associate had been eliminated and the two positions that had been offered were beyond her physical capacities.

Wal-Mart has cited the case of *Leavitt v. Wal-Mart Stores, Inc.*, 238 F. Supp. 2d 313, 314 (D.Me. 2003), *aff'd in part, vacated in part by* 74 Fed. Appx. 66 (1st Cir. 2003), in support of its position that an "adverse employment action" is a prerequisite to an ADA claim and that Ms. DiDonna's voluntary resignation precludes the finding of this essential element. In *Leavitt*, Judge Hornby described the following heightened standard of proof in constructive discharge cases: "'Constructive discharge' is a label for 'treatment so hostile or degrading that no reasonable employee would tolerate continuing in the position,' *Melendez-Arroyo v. Cutler-Hammer de P.R. Co.*, 273 F.3d 30, 36 (1st Cir. 2001), or working conditions 'so onerous abusive, or unpleasant that a reasonable person in (her) shoes would have felt compelled to resign,' *Suarez v. Pueblo International, Inc.*, 229 F.3d 49, 54 (1st Cir. 2000); or 'so unpleasant that 'staying on the job while seeking redress [would have been] intolerable.'" *Marrea v. Goya of P.R., Inc.*, 304 F.3d 7, 28 (1st Cir. 2002). Judge Hornby also noted the First Circuit has adopted an "objective standard, not dependent solely on what [the employee] believed, but rather what a reasonable person in her position would experience." *Leavitt*, 238 F.Supp.2d at 316 *citing Suarez*, 229 F.3d at 54. Judge Hornby's analysis of the constructive discharge claim was affirmed on appeal. *Leavitt*, 74 Fed. Appx. at 69.

Despite the stringent standard for constructive discharge claims, when viewing the facts in a light most favorable to the plaintiff, a factfinder could determine Ms. DiDonna was constructively discharged. A factfinder could find the following facts:

- 1) that Wal-Mart knew that Ms. DiDonna had a significant underlying condition;
- 2) that the condition was not only disabling, but likely to be progressive;
- 3) that the condition entitled her to special consideration under its own internal policy;
- 4) that Wal-Mart management ignored its own policy and awarded a new position, one that Ms. DiDonna was qualified to perform, to someone who was not disabled;
- 5) that Wal-Mart then offered Ms. DiDonna a series of jobs its management knew she could not physically perform;
- 6) that Wal-Mart made a transparent and illusory attempt to accommodate her restrictions in these positions;
- 7) that Wal-Mart then forced Ms. DiDonna to attend a meeting with three or four managers at which they demanded that she choose one of two jobs, neither of which she could perform;
- 8) that Wal-Mart management chose that meeting to confront Ms. DiDonna with the unacceptable actions of her mentally disabled husband and forced her at that meeting to acknowledge that her husband was mentally disturbed; and,
- 9) that Ms. DiDonna was reduced to uncontrollable tears and shaking at the meeting and by the end of the meeting, she required a week and a half hospitalization for depression.

These events, having taken place over the brief period between September 5, 2000, when she was told Ms. Lavoie was going to continue in the consolidated position, and culminating on September 13, 2000, when the final management meeting took place, could have led a reasonable person in Ms. DiDonna's position to conclude she had no choice but to resign.

The two versions of the events leading to Ms. DiDonna's resignation are in stark contrast and cannot be reconciled at this stage. Wal-Mart emphatically denies many of the Plaintiff's more egregious allegations and her relentlessly negative interpretations of its actions. However, even applying an objective standard, *Calhoun v. Acme Cleveland Corp.*, 798 F.2d 559, 561 (1st Cir. 1986), a genuine issue of material fact has been raised as to whether the trier of fact would conclude the working conditions would have been "so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114, 119 (1st Cir. 1977).

#### **E. Whether Plaintiff DiDonna Is Entitled To An Award Of Punitive Damages.**

To sustain an ADA claim for punitive damages, 42 U.S.C. §§ 12101-102, the Plaintiff must present sufficient evidence from which a fact finder could conclude the employer acted "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). The United States Supreme Court addressed the standard for the imposition of punitive damages in the Title VII context in the case of *Kolstad v. American Dental Association*, 527 U.S. 526 (1999). The *Kolstad* Court noted there will be "circumstances where intentional discrimination does not give rise to punitive damages liability . . . ." *Id.* at 536. These instances include when the

employer was unaware of the relevant federal prohibition, where the employer discriminated against the employee with the distinct belief that its discrimination was lawful, where the underlying theory of discrimination may be novel or otherwise poorly recognized, or where the employer may reasonably believe that its discrimination satisfies a bona fide occupational qualification defense or other statutory exception to liability. *Id.* at 536-37. The *Kolstad* Court cautioned that “Congress’s apparent intent” was “to narrow the class of cases for which punitive awards are available to a subset of those involving intentional discrimination.” and that the terms, “malice” and “reckless indifference” pertain “to the employer’s knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination.” *Id.* at 535.

The state analog, *Tuttle v. Raymond*, 494 A.2d 1353, 1363 (Me. 1985), requires there be clear and convincing evidence that the Defendant acted either with either express or implied malice. The *Tuttle* Court stated that this evidentiary standard can be met either by proving that the Defendant’s actions were “motivated by ill will toward the plaintiff” or “where deliberate conduct by the defendant, although motivated by something other than ill will toward any particular party, is so outrageous that malice toward a person . . . can be implied.” *Id.* at 1361.

Wal-Mart has presented a close case on whether the record contains sufficient evidence to present the punitive damages issue to a fact finder. However, Wal-Mart has agreed that its manager, Franklin Pushard, was “familiar with the Americans with Disabilities Act and had training specifically related to the ADA and each time Wal-Mart updates its Computer Based Learning, Mr. Pushard takes the ADA training again and as a result he understood the concepts of disability and reasonable accommodation.” Def.’s

SMF at 23. Given the extent of Mr. Pushard's training and knowledge, his decisions regarding Ms. DiDonna, when viewed in a light most favorable to her, create a factual issue as to whether they justify the imposition of punitive damages under the ADA and the MHRA.

For the reasons set forth above, Defendant Wal-Mart's Motion for Summary Judgment is DENIED.

/s/ John A. Woodcock, Jr.  
JOHN A. WOODCOCK, JR.  
UNITED STATES DISTRICT JUDGE

Dated this 21st day of January, 2004.

**Plaintiff**

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