APPENDIX D

Opposition to Motion to Dismiss filed February 1, 2018, #23 pg. 6 on Civil Docket for case #: 5:17-cv-00023-H-KS.

APPENDIX E

Opposition to Motion to Dismiss & Memorandum of Defendant Motion to Dismiss & Answer to Amended Complaint filed October 16, 2018, #48, pg. 11 on Civil Docket for case #: 5:17-cv-00023-H-KS.

APPENDIX F

ORDER: Dated September 23, 2019 DE 83 pg. 18 on Civil Docket for Case #: 5:17-cv-H-KS, and DE 90, pg. 19 filed January 28, 2020.

APPENDIX G

Compiled list of factual documents presented to the court.

APPENDIX H

Letters from Orthopaedic office of Dr. Kobbs stipulating they were not going to take the appellant out of work and that here primary doctor was Dr. Kobbs,

APPENDIX A

FILED: January 21, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1145
(5:17-cv-00023-H-KS)

MARILYNN M. MCRAE

Plaintiff - Appellant

v.

DONNIE HARRISON, Sheriff

Defendant - Appellee

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

APPENDIX A

PER CURIAM:

Marilynn M. McRae appeals the district court's order granting summary judgment in favor of Donnie Harrison on McRae's claims under the Americans with Disabilities Act, 42 U.S.C. §§ 12101 to 12213, and the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601 to 2654. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *McRae v. Harrison*, No. 5:17-cv-00023-H-KS (E.D.N.C. Jan. 28, 2020). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

Appendix A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1145

MARILYNN M. MCRAE,

Plaintiff - Appellant,

v.

DONNIE HARRISON, Sheriff,

Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Malcolm J. Howard, Senior District Judge. (5:17-cv-00023-H-KS)

Submitted: December 21, 2020 Decided: January 21, 2021

Before GREGORY, Chief Judge, FLOYD, and THACKER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Marilynn M. McRae, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

APPENDIX A

FILED: January 21, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1145, Marilynn McRae v. Donnie Harrison
5:17-cv-00023-H-KS

NOTICE OF JUDGMENT

Judgment was entered on this date in accordance with Fed. R. App. P. 36. Please be advised of the following time periods:

PETITION FOR WRIT OF CERTIORARI: The time to file a petition for writ of certiorari runs from the date of entry of the judgment sought to be reviewed, and not from the date of issuance of the mandate. If a petition for rehearing is timely filed in the court of appeals, the time to file the petition for writ of certiorari for all parties runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment. See Rule 13 of the Rules of the Supreme Court of the United States; www.supremecourt.gov.

VOUCHERS FOR PAYMENT OF APPOINTED OR ASSIGNED COUNSEL: Vouchers must be submitted within 60 days of entry of judgment or denial of rehearing, whichever is later. If counsel files a petition for certiorari, the 60-day period runs from filing the certiorari petition. (Loc. R. 46(d)). If payment is being made from CJA funds, counsel should submit the CJA 20 or CJA 30 Voucher through the CJA eVoucher system. In cases not covered by the Criminal Justice Act, counsel should submit the Assigned Counsel Voucher to the clerk's office for payment from the Attorney Admission Fund. An Assigned Counsel Voucher will be sent to counsel shortly after entry of judgment. Forms and instructions are also available on the court's web site, www.ca4.uscourts.gov, or from the clerk's office.

BILL OF COSTS: A party to whom costs are allowable, who desires taxation of costs, shall file a Bill of Costs within 14 calendar days of entry of judgment. (FRAP 39, Loc. R. 39(b)).

APPENDIX A

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC: A petition for rehearing must be filed within 14 calendar days after entry of judgment, except that in civil cases in which the United States or its officer or agency is a party, the petition must be filed within 45 days after entry of judgment. A petition for rehearing en banc must be filed within the same time limits and in the same document as the petition for rehearing and must be clearly identified in the title. The only grounds for an extension of time to file a petition for rehearing are the death or serious illness of counsel or a family member (or of a party or family member in pro se cases) or an extraordinary circumstance wholly beyond the control of counsel or a party proceeding without counsel.

Each case number to which the petition applies must be listed on the petition and included in the docket entry to identify the cases to which the petition applies. A timely filed petition for rehearing or petition for rehearing en banc stays the mandate and tolls the running of time for filing a petition for writ of certiorari. In consolidated criminal appeals, the filing of a petition for rehearing does not stay the mandate as to co-defendants not joining in the petition for rehearing. In consolidated civil appeals arising from the same civil action, the court's mandate will issue at the same time in all appeals.

A petition for rehearing must contain an introduction stating that, in counsel's judgment, one or more of the following situations exist: (1) a material factual or legal matter was overlooked; (2) a change in the law occurred after submission of the case and was overlooked; (3) the opinion conflicts with a decision of the U.S. Supreme Court, this court, or another court of appeals, and the conflict was not addressed; or (4) the case involves one or more questions of exceptional importance. A petition for rehearing, with or without a petition for rehearing en banc, may not exceed 3900 words if prepared by computer and may not exceed 15 pages if handwritten or prepared on a typewriter. Copies are not required unless requested by the court. (FRAP 35 & 40, Loc. R. 40(c)).

order to do

MANDATE: In original proceedings before this court, there is no mandate. Unless the court shortens or extends the time, in all other cases, the mandate issues 7 days after the expiration of the time for filing a petition for rehearing. A timely petition for rehearing, petition for rehearing en banc, or motion to stay the mandate will stay issuance of the mandate. If the petition or motion is denied, the mandate will issue 7 days later. A motion to stay the mandate will ordinarily be denied, unless the motion presents a substantial question or otherwise sets forth good or probable cause for a stay. (FRAP 41, Loc. R. 41).

"A mandate is a device that transfers jurisdiction to another court. Appellate court closes an appeal. Fed R of Appellate procedure 41.

APPENDIX C

FILED: February 23, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1145
(5:17-cv-00023-H-KS)

MARILYNN M. MCRAE

Plaintiff - Appellant

v.

DONNIE HARRISON, Sheriff

Defendant - Appellee

ORDER

The court denies the petition for rehearing.

Entered at the direction of the panel: Chief Judge Gregory, Judge Floyd, and Judge Thacker.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX C

20-1145

Marilynn M. McRae
4233 Birmingham Way
Raleigh, NC 27604

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO.: 5:17-CV-23-H

MARILYNN M. MCRAE, Plaintiff, v. DONNIE HARRISON, SHERIFF OF WAKE COUNTY, NORTH CAROLINA, in his official capacity, Defendant.	)	**ORDER**

This matter is before the court on defendant's motion for summary judgment, [DE #68]. Plaintiff, proceeding pro se, has responded, [DE #71, #72, #73]. The time for further filings has expired. This matter is ripe for adjudication.

PROCEDURAL HISTORY

On September 15, 2017, United States Magistrate Judge Kimberly A. Swank entered an order and memorandum and recommendation ("M&R"), which this court adopted, allowing plaintiff to proceed in forma pauperis and recommending that plaintiff's Americans with Disabilities Act ("ADA") claims, namely wrongful termination, retaliation, and harassment, "be allowed to proceed against Defendant Donnie Harrison in his official capacity

Didn't mention FMLA

and that any remaining ADA claims against Defendants Harrison, Higdon, and Butler be dismissed as frivolous or for failure to state a claim upon which relief can be granted; and that plaintiff's Title VII claims be dismissed in their entirety as frivolous or for failure to state a claim upon which relief can be granted. [DE #4 and #6].

On January 16, 2018, defendant filed an answer to the complaint. [DE #15]. On January 17, 2018, defendant filed a motion to dismiss. Judge Swank entered an order and M&R construing plaintiff's response to defendant's motion to dismiss as a supplement to plaintiff's complaint and recommending that defendant's motion to dismiss be dismissed as moot in light of the amendment of plaintiff's complaint. [DE #36]. On September 11, 2018, this court adopted the recommendation of the United States Magistrate Judge as its own and dismissed as moot defendant's first motion to dismiss. [DE #41].

On September 25, 2018, defendant filed a second motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), [DE #44], which this court granted in part to the extent that plaintiff's claim of Intentional Infliction of Emotional Distress against defendant was dismissed, and denied as to plaintiff's claims of 1) wrongful discharge under the ADA; 2) Failure to Reasonably Accommodate under the ADA; 3) Retaliation under the ADA; 4) Harassment / Hostile Work Environment under the

ADA; and 5) Family and Medical Leave Act ("FMLA") Violations. [DE #83]. Defendant filed the instant motion for summary judgment on April 15, 2019. [DE #68].

STATEMENT OF THE FACTS[1]

Plaintiff began working for the Sheriff of Wake County in September 2003. [DE #66-1 Dep. Marilyn McRae at 22:21-23] and [DE #78 at 7]. Plaintiff's job duties included ensuring the safety and security of the jail. [DE #66-1 at 23:23-25 and 24:1-2; 26:5-11].

"Detention officers are assigned to work 12-hour shifts with the exception of a limited number of assignments." [DE #66-18 Aff. Gene D. Butler[2] at 2 ¶8]. These shifts are "essential to the operation of the jail because they are utilized to maximize the number of detention officer positions allocated by the County Commissioners and to ensure and maintain an acceptable inmate to officer ratio," when taking into account "the overall number of detention officer positions, the average number of vacancies, vacation and training time, sick and other leave, including military, parental and FMLA." [DE #66-18 at 2 ¶9].

Subduing unruly inmates was part of the detention officer job when working in housing. [DE #66-1 at 31:10-13]. Lifting

[1] The facts as stated below are as set forth in the Statement of Undisputed Material Facts. [DE #67].

[2] Dail Butler was the Jail Director from December 2010 until February 2019. [DE #66-18 at 1 ¶2]. As Jail Director, all detention officers including plaintiff were under his supervision. [DE #66-18 at 1 ¶2].

objects, lifting people, and walking up and down stairs were part of the detention officer job when they were not working in a control station or on a dorm floor without stairs. [DE #66-1 at 32:5-20]. While working in housing, a detention officer may have to "take down" an inmate. [DE #66-1 at 33:2-8]. During her eleven years of employment, she worked in all the control stations, as well as worked in housing. [DE #66-1 at 27:8-12].

It is undisputed that in 2013 and 2014, plaintiff was treated for osteoarthritis in her knees. [DE #66 at 7; DE #72 at 1; DE #78 at 4, 5, 6]. On January 31, 2013, Dr. Kobs of Raleigh Orthopedic Clinic, provided a work note stating that plaintiff must wear a brace while at work. [DE #78 at 30]. On February 19, 2013, Dr. Kobs provided a work note stating that plaintiff could only climb one flight of stairs per bout for four weeks. [DE #78 at 31]. On April 19, 2013, Dr. Kobs wrote a work note stating that plaintiff could only climb one flight per bout and may return to light duty work for six weeks with minimized stair climbing and must wear braces. [DE #78 at 32]. On June 26, 2013, plaintiff was provided a work note from Raleigh Orthopedic Clinic stating plaintiff would be limited for six weeks to no lifting more than 10-15 pounds; no bending/stooping; no twisting; limited standing; no ladders; no pushing/pulling; no kneeling/squatting; limited walking as tolerated; and that she should wear knee braces while at work. [DE #78 at 33].

In July 2013, plaintiff was contacted on her day off by Lieutenant Inscore to attend a mandatory meeting for employees on light duty. [DE #66-1 at 37:11-14 and 38:1-6]. Plaintiff told Lt. Inscore she was out of town and could not make it back in time for the meeting. [DE #66-1 at 38:15-18]. Plaintiff is unsure whether the meeting was the same day as the phone call, or the very next day.[3] [DE #66-1 at 45:9-21]. When plaintiff returned to work, although the exact date on which she returned is disputed, she reported to work in the control station, and was subsequently taken to a meeting. [DE #66-1 at 38:1-6; 16-18; 21-22]. On that day, plaintiff met with Director Butler[4], Assistant Director Higdon, Major Floyd-Drayton and Administrator Williams. [DE #66-1 at 39:9-11]. She was told she missed a mandatory meeting. She explained she had been out of town. [DE #66-1 at 39:14-23]. Plaintiff was accused of being insubordinate during the meeting by Director Butler. Director Butler told plaintiff she would be suspended indefinitely. [DE #66-1 at 40:21-23]. The same day, plaintiff went to Sheriff Harrison to discuss the meeting and suspension. [DE #66-1 at 43:10-15]. On July 19, 2013, Director Butler called her back in and asked her to sign a form stating she

[3] Plaintiff writes in her memorandum in opposition that the date that she was called was July 17, 2014, [DE #71 at 2], however, plaintiff was told in February of 2014 that she should not return to work. The court construes this 2014 reference to the date of the phone call as a typographical error by plaintiff. Plaintiff states in her second memorandum that she received the phone call in July 2013. [DE #71 at 4].

[4] As previously noted, Dail Butler was the Jail Director from December 2010 until February 2019. [DE #66-18 at 1 ¶2].

was insubordinate, and she was returned to work. She was only suspended for one day. [DE #66-1 at 43:16-21 and DE #66-3 at 1]. Plaintiff did not agree she was insubordinate but signed the form in order to return to work. [DE #66-1 43:21-23].

Detention officers normally worked on a rotation of five twelve-hour shifts one week, followed by two twelve-hour shifts the following week, for a total of 84 hours for two weeks, and 168 hours per month. [DE #66-1 at 55:20-25 and 56:1-5]. On July 29, 2013, plaintiff was given work restrictions by Raleigh Orthopedic that she could not do any kneeling, squatting, steps, should have a flexible sit-stand schedule, wear knee braces, and could not work more than eight-hours a day. [DE #66-1 at 63:25 and at 64:1-7; DE #66-4 at 1]. In August 2013, all light duty personnel were moved to night shift. [DE #66-1 at 43:23-25]. Since plaintiff was on light duty, she was placed on night shift.[5] Because she could only work eight hours, plaintiff was given a schedule of 6:45 p.m. to 2:45 a.m. [DE #66-1 at 43:24-25 and 53:5-16].

While she did not have a specific time scheduled for a meal break, when plaintiff needed a meal or other type break, her

[5] Plaintiff contends in her memo in response that the night shift was 12 hours, and that "[w]e did it." [DE #71 at 2]. Plaintiff explains the hours given to her on the night shift were 2:45-6:45, which the court construes as a typographical error, intending to state 6:45-2:45. [DE #71 at 4-5]. Plaintiff states that she "wasn't allowed to work a 40 hour week, and had to stay on the 12 hour rotation where she lost time." [DE #71 at 4 citing DE #73-25 at 2-3].

supervisors, Lieutenant High and Sergeant Woodward, would accommodate her. [DE #66-1 at 55:8-19 and 62:7-18 and 63:12-15]. On August 1, 2013, Plaintiff spoke with Assistant Director Higdon about the hours she was scheduled and that she did not have a specific time scheduled for a meal break. [DE #66-1 at 56:8-13].

Plaintiff also talked to Wake County Sheriff's Office Human Resources on that date regarding the hours she was scheduled and not being allowed a forty-hour week, as well as having to use leave for the four hours of the 12 hour shift she could not work. [DE #66-1 at 56:20-24 and 57:20-25; DE #78 at 3]. On September 25, 2013, Raleigh Orthopedic provided a work note that plaintiff was unable to do steps, kneeling/squatting, must have a flexible sit/stand schedule and must wear braces. She continued to be limited to a maximum of 8 hours of work per day. [DE #78 at 4]. On October 18, 2013, Raleigh Orthopedic provided a work note indicating that plaintiff's restrictions were permanent. [DE #78 at 5]. In November 2013, Plaintiff applied for and received short-term disability benefits for the four hours of her 12-hour shift that she was unable to work. [DE #66-1 at 76:16-25 and 77:1; DE #78 at 1, 26-29]. The jail did not have permanent control room positions.[6] [DE #66-18 at 3 ¶¶ 11 and 13]. The only eight-

[6] While plaintiff contends this is not a true statement, [DE #66-1 at 74:19-23], she does not provide evidence to support her contention other than stating two other officers were permanent. [DE #72 at 6]. However, petitioner admitted at another point in her pleadings that she knew the control room position was not permanent. [DE #72 at 8].

hour detention officer positions are in disciplinary and records, which both involve direct contact with inmates. [DE #66-18 at 3 ¶¶ 11 and 12]. The position in disciplinary requires the ability to conduct inmate frisks and apply and remove restraints. This requires the ability to squat, kneel, bend, and stoop which was in contravention to Plaintiff's restrictions. [DE #66-18 at 3 ¶12]. Records officers must file and retrieve records, which also requires squatting, significant walking and stairs. [DE #66-18 at 3 ¶12].

On January 23, 2014, Dr. Kobs at Raleigh Orthopedic indicated plaintiff had permanent restrictions of no steps, no kneeling or squatting, ~~flexible~~ sit/stand, wear braces, and maximum of 8 hours per day. [DE #78 at 6].

At that time, while plaintiff was working, she was also receiving four hours of disability from a disability policy. [DE #66-1 at 67:1-4]. Plaintiff was also allowed to use shared leave and leave without pay to make up the other four hours of her shift. [DE #78 at 13-23] and [DE #66-18 at 2 ¶10]. On January 30, 2014, plaintiff was given a letter from Larry Wood, Chief of Staff advising her that due to her medical restrictions, if she could not return to a 12-hour shift by February 15, 2014, her employment would be terminated due to medical hardship and unavailability to perform the duties of a detention officer. [DE #66-1 at 69:8-25; DE #66-5 at 1]. At that time, plaintiff was

still under work restrictions of no squatting, no kneeling, no steps, and limited to a forty-hour week. [DE #66-1 at 73:16-25].

On February 1, 2014, plaintiff sent an email to Karen Wallace of Human Resources regarding a letter she received from Detention Director Butler stating that he would be backdating her Family Medical Leave hours to October 2013 when she started only working 8-hour shifts. [DE #66-1 at 66:2-7 and 21-25 and 67:1-4; DE #71-20 at 1-3 Email exchange addressing letter contents]. Plaintiff testified at her deposition that Director Butler's letter also requested that she have her medical provider review her job duties and submit an anticipated date that her restricted duty status would end. [DE #66-1 at 72:10-23]. Plaintiff indicated she did not agree with Director Butler taking her FMLA without her approval. [DE #78 at 1-2]. Plaintiff's Family Medical leave was not backdated to October 2013. Plaintiff was in FMLA status from February 2014 until May 2014. [DE #66-15 at 5-8; DE #66-16 at 1-2; DE #66-8 at 1].

Plaintiff considered working in the control station to be a reasonable accommodation. She did not consider it to be permanent, but also admitted she did not know how long she would need to work in the control station to return to a normal shift. [DE #66-1 at 74:3-19]. On February 14, 2014, Plaintiff received a phone call from Lt. Anastasia informing her that she should not report to work since she could not work a 12-hour shift. Plaintiff

emailed Karen Wallace to confirm the instruction not to report to work. [DE #66-1 at 84:20-25 and 85:1-6, 8-12; DE #78 at 9-10]. On March 20, 2014, plaintiff filed a Charge of Discrimination with the EEOC. [DE #66-19 at 1]. Plaintiff filed a second Charge of Discrimination with the EEOC on July 16, 2014. [DE #66-19 at 2-3].

On December 3, 2014, plaintiff received a letter from Chief of Staff Larry Wood dated December 1, 2014. The letter stated that plaintiff had not been working since February 10, 2014 because 8-hour shifts were no longer available. Plaintiff was granted 12 weeks of Family Medical Leave which ended May 11, 2014. The letter further stated the Sheriff's Office could no longer sustain the hardship of her absence. Plaintiff was provided a Fitness for Duty certification, as well as a job description. The letter stated that if she was unable to return to work by December 15, 2014, her employment would be terminated based upon her inability to perform the required duties of a detention officer. [DE #66-8 at 1]. Plaintiff acknowledged receiving the December 1, 2014 letter, as well as Policy 901, Classification 7036, and the Fitness for Duty Form. [DE #66-1 at 89:9-25 and 90:1-2]. Classification 7036 states the essential functions of a detention officer, although plaintiff disputes receiving the document entitled "Essential Job Functions of Wake County Detention Officer." [DE #66-1 at 90:17-23; DE #66-8 at 7-8]. In December

Termination date different

Didn't dispute

2014, Plaintiff's medical condition was unchanged from February 2014. [DE #66-1 at 92:19-25 and 93:5-7].[7] On December 19, 2014, Plaintiff was separated from her position as a Detention Officer due to her inability to perform the required physical duties. She continued to only be able to work up to eight hours a day, and was limited to no stairs, climbing, squatting, kneeling, or prolonged walking, and she was scheduled for a knee replacement on January 12, 2015. [DE #66-9 at 1]. On January 12, 2015, plaintiff underwent a total knee replacement at WakeMed Hospital in Raleigh. [DE #66-1 at 116:1-8]. In April of 2015, plaintiff underwent a correction surgery on the left knee. [DE #66-1 at 116:13-17]. On August 14, 2015, Plaintiff underwent manipulation of the left knee under anesthesia. [DE #66-1 at 117:6-21]. On January 20, 2016, Plaintiff underwent surgery again. [DE #66-1 at 118:1-4]. On October 17, 2016, the EEOC issued a Right to Sue Letter. [DE #1-2 and DE #1-3].

In May 2017, plaintiff underwent replacement of an allergic prosthesis. [DE #66-1 at 118:13-25 and 119:1-19]. Plaintiff has had a total of five surgeries and one manipulation of her left knee. [DE #66-1 at 112:1-17 and 113:2-5]. The last surgery was on May 30, 2017 for removal of an allergenic metal prosthesis,

[7] Plaintiff contends she was able to return to work for 12-hour shifts in December 2014, [DE #66-1 at 93:9-14]. However, she has provided no evidence in support of this assertion, and the termination letter dated December 19, 2014, states that plaintiff was still restricted to 8-hour shifts. [DE #66-9 at 1 and DE #71-10 at 1].

which was replaced with titanium. [DE #66-1 at 113:8-15]. Her last appointment was on July 23, 2018. [DE #66-1 at 115:4-8].

COURT'S DISCUSSION

I. Standard of Review on Motion for Summary Judgment

Summary judgment is appropriate pursuant to Rule 56 of the Federal Rules of Civil Procedure when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

Once the moving party has met its burden, the non-moving party "'may not rest on the mere allegations or denials of [its] pleading," Anderson, 477 U.S. at 248 (quoting First Nat'l Bank of Arizona v. Cities Serv. Co., 391 U.S. 253 (1968)), but "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). Summary judgment is not a vehicle for the court to resolve disputed factual issues. Faircloth v. United States, 837 F. Supp. 123, 125 (E.D.N.C. 1993). Instead, a trial court reviewing a claim at the summary judgment stage should determine whether a genuine issue exists for trial. Anderson, 477 U.S. at 249.

In making this determination, the court must view the inferences drawn from the underlying facts in the light most favorable to the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam). Only disputes between the parties over facts that might affect the outcome of the case properly preclude the entry of summary judgment. Anderson, 477 U.S. at 248. Accordingly, the court must examine "both the materiality and the genuineness of the alleged fact issues" in ruling on this motion. Faircloth, 837 F. Supp. at 125 (citing Ross v. Commc'ns Satellite Corp., 759 F.2d 355, 364 (4th Cir. 1985)). Furthermore, a mere scintilla of evidence supporting the case is not enough. Anderson, 477 U.S. at 252. The entry of summary judgment is appropriate "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322.

A. Failure to Reasonably Accommodate under the ADA

A failure to reasonably accommodate claim under the ADA is established by a showing: "(1) that [plaintiff] was an individual who had a disability within the meaning of the statute; (2) that the [employer] had notice of h[er] disability; (3) that with reasonable accommodation [s]he could perform the essential functions of the position . . .; and (4) that the [employer]

refused to make such accommodations." Rhoads v. F.D.I.C., 257 F.3d 373, 387 n.11 (4th Cir. 2001) (quoting Mitchell v. Washingtonville Cent. Sch. Dist., 190 F.3d 1, 6 (2d Cir. 1999)).

Defendant concedes the first and second elements, that is, plaintiff has presented evidence she suffered a disability as defined within the statute and defendant, as plaintiff's employer, had notice of the disability. However, defendant argues, and this court agrees, as to the third and fourth elements, plaintiff has failed to offer evidence that she could perform the essential functions of her position with or without accommodation and that defendant failed to reasonably accommodate her. [DE #66 at 6].

The third element requires a showing "'that with reasonable accommodation [s]he could perform the essential functions of the position,'" that is, that plaintiff is a "qualified individual" as defined by the ADA. Wilson v. Dollar General Corp., 717 F.3 337, 345 (4th Cir. 2013) (quoting Rhoads, 257 F.3d at 387 n.11; and 42 U.S.C. § 12111(8)). "For purposes of the ADA, 'reasonable accommodations' may comprise 'job restructuring, part-time or modified work schedules.'" Id. at 345 (quoting 42 U.S.C. § 12111(9)(B)).

Plaintiff and defendant do not dispute the responsibilities of a detention officer include maintaining the safety and security of the jail, [DE #67 at 2; DE #66-1 at 24:1-2], and agree the specific duties of a detention officer are detailed in a document

entitled "Classification 7036." [DE #66-1 at 90-91; DE #66-8 at 7-8; and DE #67 at 9]. "Essential functions" are defined, in relevant part, as "[w]ritten job descriptions prepared before advertising or interviewing applicants for the job." 29 C.F.R. § 1630.2(n)(3)(ii). Classification lists essential functions including but not limited to supervising inmate activities, physically restraining inmates, and mediating disputes between inmates. [DE #66-8 at 7]. The essential functions of light duty include "[v]erif[ying] inmate conditions when arrested[;] [v]erif[ying] release orders and maintain[ing] records of activities" as well as "[a]ssist[ing] in the training of new officers." [DE #66-8 at 7]. The lifting requirements are as follows for the various levels of duty:

> Sedentary: Exerting up to 10 lbs. occasionally or negligible weights frequently; sitting most of the time.
>
> Light: Exerting up to 20 lbs. occasionally, 10 lbs. frequently, or negligible amounts constantly, OR requires walking or standing to a significant degree.
>
> Medium: Exerting 20-50 lbs. occasionally, 10-25 lbs. frequently, or up to 10 lbs. constantly.
>
> Heavy: Exerting 50-100 lbs. occasionally, 10-25 lbs. frequently, or up to 10-20 lbs. constantly.
>
> Very Heavy: Exerting over 100 lbs. occasionally, 50-100 lbs. frequently, or up to 20-50 lbs. constantly.

[DE #66-8 at 7].

In a document entitled "Wake County Sheriff's Office Essential Job Functions of a Wake County Detention Officer," the

following description of physical activities required to gain control of an unruly inmate is provided:

> a) Grasping: Applying pressure to an object with the fingers and palm.
> b) Pushing: Using upper extremities to press against something with steady force in order to thrust forward, outward or downward.
> c) Lifting: Raising an object from a lower to a higher position and moving objects horizontally from position to position. This factor is important if it occurs to a considerable degree and requires the substantial use of the upper extremities and back muscles.
> [d]) Climbing: Ascending or descending ladders, stairs, bar work and the like, using feet and legs and/or hands and arms.
> [e]) Stooping: Bending body downward and forward by bending spine at the waist. This factor is important if it occurs to a considerable degree and requires full use of the lower extremities and back muscles.
> [f]) Kneeling: Bending legs at knee to come to a rest on knee or knees.
> [g]) Feeling: Perceiving attributes of objects, such as size, shape, temperature or texture by touching with skin, particularly that of fingertips.

[DE #66-8 at 6 ¶¶ 15 and 16].

It is undisputed at all times relevant to the complaint, plaintiff was suffering from osteoarthritis and was under medical restrictions which either prohibited or severely restricted her from kneeling, squatting, going up or down stairs, walking, lifting any substantial weight, including a restriction of no more than 10-15 pounds or working more than 8 hours at a time. [DE #78 at 4-6, 30-33].

Plaintiff argues she could work in the control room for eight-hour shifts, however defendant has presented evidence that this

does not constitute the performance of the essential functions of being a detention officer because the shifts were 12-hour shifts due to staffing allotments, and the control room positions, which were also 12-hour shifts but had no inmate contact, were not permanent positions. [DE #66 at 8; DE #66-18 Affidavit of Gene D. Butler at 2-3]. Plaintiff was unable to perform the essential functions of her job and therefore was not a "qualified individual" within the ADA. E.E.O.C. v. Womble Carlyle Sandridge & Rice, LLP, 616 F. App'x 588, *595 (4th Cir. June 26, 2015) (excusing plaintiff from all heavy-lifting or "requiring assistance for all tasks that involve[d] lifting more than 20 pounds would reallocate essential functions, which the ADA does not require.") (citing 29 C.F.R. § 1630.2(o)).

As to the fourth element, defendant argues plaintiff has not shown that defendant did not reasonably accommodate her because an employer may offer temporary light duty, but is not required to create permanent light duty. See Champ v. Baltimore Cty., 884 F.Supp. 991, 1000 (4th Cir. 1996) (quoting Howell v. Michelin Tire Corp., 860 F.Supp. 1488, 1492 (M.D. Ala. 1994)) ("Therefore, if a light-duty job is a temporary job, reassignment to that job need only be for the temporary period of the job and an employer need not convert a temporary job into a permanent one."). The ADA requires a "feasible" or "plausible" accommodation. US Airways, Inc. v. Barnett, 535 U.S. 391, 402 (2002) (citing Reed v. LePage

Bakeries, Inc., 244 F.3d 254, 259 (1st Cir. 2001) and quoting Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 138 (2d Cir. 1995)). However, the ADA does not require creation of a permanent light-duty position. See Hill v. Harper, 6 F.Supp.2d 540, 543 (E.D. Va. 1998) ("An accommodation is considered unreasonable if it requires elimination of an 'essential function.'") (citing Hall v. U.S. Postal Serv., 857 F.2d 1073, 1078 (6th Cir. 1988)).

In his affidavit, Dail Butler, the Jail Director of the Wake County detention facilities at all times relevant to the complaint, stated there were no permanent control room positions. [DE #66-18 at 3]. Additionally, while plaintiff requested an 8-hour shift in either a disciplinary or records position, both of those required contact with inmates, and plaintiff could not perform the essential functions required for an inmate contact position.

> Contact with inmates requires that a detention officer to [sic] be able to physically restrain an inmate if necessary for the safety of the officer or the safety of other officers or inmates. Additionally, it requires the detention officer to be able to conduct inmate frisks, apply and remove restraints such as handcuffs, waist chains and leg irons. These activities require the ability to squat, kneel, bend, stoop and push and pull significant weight, contrary to [plaintiff's] doctor's instructions.
>
> [DE #66-18 Butler Aff. at 3].

Inmate contact is an essential function of being a detention officer, and "[a]n employer is not required to grant even a reasonable accommodation unless it would enable the employee to

perform all of the essential functions of her position." Jacobs v. N.C. Admin. Office of the Courts, 780 F.3d 562, 581 (4th Cir. 2015).

In Hill, the court granted summary judgment to a defendant on similar facts. Hill, 6 F.Supp.2d at 545. Plaintiff was a deputy sheriff who worked in a jail and had an impaired ability to stand, walk, and climb stairs. Id. at 541-42. He was accommodated with a three-year position in the control room. Id. at 542, 544. However, after three years the sheriff changed the light-duty policy, and Hill resigned as he could no longer perform all duties of a jail deputy. Id. at 542. Hill argued he could have been reasonably accommodated by remaining in the control room, and the court found as "this accommodation effectively eliminated the 'essential function' of being able to rotate through the various duty posts," it did not constitute a "reasonable accommodation." Id. at 544.

"The ADA imposes upon employers a good-faith duty 'to engage [with their employees] in an interactive process to identify a reasonable accommodation.'" Jacobs, 780 F.3d at 581 (quoting Wilson, 717 F.3d at 346). "This duty is triggered when an employee communicates her disability and desire for an accommodation—even if the employee fails to identify a specific, reasonable accommodation." Id. (citing Wilson, 717 F.3d at 346). "However, an employer will not be liable for failure to engage in the

interactive process if the employee ultimately fails to demonstrate the existence of a reasonable accommodation that would allow her to perform the essential functions of the position." Id. (citing Wilson, 717 F.3d at 347; Deily v. Waste Mgmt. of Allentown, 55 F. Appx. 605, 607 (3d Cir. 2003)). As stated above, plaintiff failed to demonstrate the existence of a reasonable accommodation that would allow her to perform the essential functions of the position, namely - contact with inmates. Therefore, defendant's motion for summary judgment is granted as to this claim.

B. Wrongful Discharge

A wrongful discharge claim under the ADA is established by a showing that: "(1) [plaintiff] is within the ADA's protected class; (2) [s]he was discharged; (3) at the time of [her] discharge, [s]he was performing the job at a level that met [her] employer's legitimate expectations; and (4) [her] discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination." Rhoads, 257 F.3d at 387 n.11 (quoting Haulbrook v. Michelin N. Am., 252 F.3d 696, 702 (4th Cir. 2001)).

Title I of the ADA prohibits a covered employer from discriminating against a "qualified individual on the basis of disability" with regard to her employment. 42 U.S.C. § 12112(a). A "qualified individual" is one who can perform the essential functions of the employment position, with or without reasonable

accommodation. 42 U.S.C. § 12111(8). A person has a disability within the meaning of the ADA if she has (1) "a physical or mental impairment that substantially limits one or more major life activities"; (2) "a record of such impairment;" or (3) "[is] regarded as having such an impairment." 42 U.S.C. § 12102(1). Plaintiff has a disability, but she has not presented evidence that she is a qualified individual under the statute because she has not shown she is able to perform the essential functions of her role, with or without a reasonable accommodation, as discussed supra, section A.

Finding there are no genuine issues of material fact on the claim of wrongful discharge, and that defendant is entitled to judgment on this claim as a matter of law, defendant's motion for summary judgment on plaintiff's wrongful discharge claim under the ADA, is GRANTED.

C. Hostile Work Environment under the ADA, [DE #66 at 22-24]

A hostile work environment claim under the ADA, is established by showing:

> (1) [plaintiff] is a qualified individual with a disability; (2) [she] was subjected to unwelcome harassment; (3) the harassment was based on [her] disability; (4) the harassment was sufficiently severe or pervasive to alter a term, condition, or privilege of employment, and (5) some factual basis exists to impute liability for the harassment to the employer.

Fox v. Gen. Motors Corp., 247 F.3d 169, 177 (4th Cir. 2001) (citing Brown v. Perry, 184 F.3d 388, 393 (4th Cir. 1999)).

Because as previously analyzed, plaintiff has not shown evidence that she is a qualified individual with a disability, this claim fails.

Therefore, defendant's motion for summary judgment on plaintiff's hostile work environment claim is GRANTED.

D. Retaliation under the ADA, [DE #66 at 19-22]

A retaliation claim under the ADA, is established by a showing that: "(1) [plaintiff] engaged in a protected activity; (2) her employer acted adversely against her; and (3) her protected activity was causally connected to her employer's adverse action." Rhoads, 257 F.3d at 392 (citing Haulbrook, 252 F.3d at 705-07; Beall v. Abbott Labs., 130 F.3d 614, 619 (4th Cir. 1997)).

The ADA prohibits an employer from discriminating against "any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. § 12203(a).

Plaintiff requested accommodation by seeking an 8-hour shift in July 2013 when her doctor's orders restricted her to 8-hour shifts. See Haulbrook, 252 F.3d at 706 n.3 (determining protected activity includes requesting an accommodation). Additionally, plaintiff complained of both her lack of a lunch break during an 8-hour shift and her having to use other means to leave her 12

hour shift after 8 hours to the HR department in August 2013 and filed complaints with the EEOC in February and June of 2014.[8]

However, plaintiff has not presented evidence of an adverse employment action. On January 30, 2014, plaintiff was given a letter from Larry Wood, Chief of Staff advising her that due to her medical restrictions, if she could not return to a 12-hour shift by February 15, 2014, her employment would be terminated due to medical hardship and unavailability to perform the duties of a detention officer. [DE #66-1 at 69:8-21; DE #66-5 at 1]. However, plaintiff was not terminated on February 16, 2014. Rather, she was allowed to go on FMLA leave for twelve weeks. Additionally, defendant presented evidence that plaintiff's direct supervisors always made sure she was relieved for breaks when she needed them. [DE #66-1 at 53:5-16]. Finally, she was allowed to work 8-hour shifts for a time after her request and was allowed to use leave to make up for the other four hours of the 12-hour shifts. [DE #66-1 at 43:24-25 and 53:5-16 and DE #66-18 at 3-4 ¶ 10]. 12-hour shifts were essential for the officers, but plaintiff was allowed to work in the control room without inmate contact in compliance with her doctor's orders for approximately six months. [DE #66-18 at 2-3]. Plaintiff has presented no evidence supporting a

[8] However, plaintiff does not allege adverse action occurring after the protected activity of filing EEOC complaints.

He lied FMLA and document

causal connection between her August 2013 complaint and her January 30, 2014 letter.

Plaintiff has not presented evidence to support a causal connection between her protected activity and the adverse employment action and therefore defendant's motion for summary judgment on plaintiff's retaliation claim under the ADA is GRANTED.

E. FMLA Claims [DE #66 at 24-27]

A. Interference

A claim that an employer interfered with an employee's rights under the FMLA is established by a showing that: "(1) [plaintiff] is entitled to an FMLA benefit; (2) [her] employer interfered with the provision of that benefit; and (3) that interference caused harm." Adams v. Anne Arundel Cty. Pub. Sch., 789 F.3d 422, 427 (4th Cir. 2015) (citing Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 89 (2002); Wonasue v. Univ. of Md. Alumni Ass'n, 984 F.Supp.2d 480, 495 (D. Md. 2013)).

In support of this claim, plaintiff shows: (1) In February 2014, Director Butler told her he would backdate her FMLA to October 2013 for the four hours she was unable to work of her 12-hour shifts, [DE #66-1 at 66:11-15, 21-25; 67:1-12; DE #78 at 13-23]; (2) Plaintiff was placed on FMLA in February 2014 despite not requesting to be put on FMLA because Defendant could no longer accommodate her working only an eight-hour shift, [DE #66-15 at 5-8 and DE #66-16 at 1-2]; (3) Plaintiff remained out of work until

December 2014 when the employer separated her for her inability to perform required duties, [DE #66-8 at 1; DE #66-9 at 1]; and (4) Plaintiff was out of work for nearly forty total weeks from February 2014 until December 2014, [DE #66-8 at 1].

However, the undisputed evidence also shows plaintiff's termination letter from December 2014 stated that her FMLA time began in February 2014; it was not backdated. [DE #66-8 at 1]. She was out of work for 40 weeks, although her FMLA leave terminated in May 2014, far longer than the 12 weeks provided in the Act. See 29 U.S.C. § 2612(a)(1)(D):

> Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following: (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

Plaintiff, who received the entire 12 weeks of leave under the FMLA, has "fail[ed] to make a showing sufficient to establish the existence of an element essential to [her] case, and on which [she] will bear the burden of proof at trial." Celotex, 477 U.S. at 322.

Therefore, defendant's motion for summary judgment on plaintiff's interference claim under the FMLA is GRANTED.

B. Retaliation

The elements of a retaliation claim under the FMLA are the same as a retaliation claim under Title VII. Laing v. Fed. Express Corp., 703 F.3d 713, 717 (4th Cir. 2013) (citing Yashenko v. Harrah's N.C. Casino Co., 446 F.3d 541, 551 (4th Cir. 2006)). To establish a retaliation claim, a plaintiff must show "'(1) that she engaged in a protected activity,' as well as '(2) that her employer took an adverse employment action against her,' and '(3) that there was a causal link between the two events.'" Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264, 281 (4th Cir. 2015) (quoting EEOC v. Navy Fed. Credit Union, 424 F.3d 397, 405-06 (4th Cir. 2005)). If the plaintiff can make a prima facie case of retaliation, then "the burden shifts to [defendant] to articulate a nondiscriminatory reason for its action." Laing, 424 F.3d at 719 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)). Plaintiff then has the opportunity to prove that the employer's "proffered explanation is pretext for FMLA retaliation." Id. at 721 (quoting Nichols v. Ashland Hosp. Corp., 251 F.3d 496, 502 (4th Cir. 2001)).

The court liberally construed plaintiff's pleadings at an earlier stage of the litigation finding a retaliation claim under the FMLA. However, plaintiff has not presented evidence to meet her burden of establishing a prima facie case of retaliation,

therefore, defendant's motion for summary judgment as to a retaliation claim under the FMLA is hereby GRANTED.

CONCLUSION

For the foregoing reasons, defendant's motion for summary judgment, [DE #68], is GRANTED. The clerk is directed to close this case.

This 28th day of January 2020.

Malcolm J. Howard
Senior United States District Judge

At Greenville, NC
#35

I certify the foregoing to be a true and correct copy of the original.
Peter A. Moore, Jr., Clerk
United States District Court
Eastern District of North Carolina
By: Donna Rudd
Deputy Clerk