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**NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION**

No. 16-6498

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BEVERLY D. MCMAHON,	)	
Plaintiff-Appellee,	)	
v.	)	ON APPEAL FROM
	)	THE UNITED
METROPOLITAN	)	STATES DISTRICT
GOVERNMENT OF	)	COURT FOR
NASHVILLE AND	)	THE MIDDLE
DAVIDSON COUNTY,	)	DISTRICT OF
TENNESSEE,	)	TENNESSEE
Defendant-Appellant.	)	

ORDER

(Filed Jun. 27, 2017)

Before: KETHLEDGE, WHITE, and STRANCH,
Circuit Judges.

The Metropolitan Government of Nashville and Davidson County, Tennessee (Nashville) appeals a district court order denying its motion for judgment as a matter of law following a jury trial that resulted in a verdict for Beverly D. McMahon (McMahon), a former employee, on her claim of failure to accommodate under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq. The parties have waived oral

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argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

McMahon filed a complaint alleging claims under the ADA and Title VII of the Civil Rights Act of 1964, as well as Tennessee law. Motions for summary judgment were filed by both sides. A magistrate judge recommended that Nashville's motion be granted as to some of the claims and that both parties' motions be denied as to the remaining claims. The district court adopted this recommendation. A jury trial followed. The jury found for McMahon only on her claim of failure to accommodate under the ADA. Nashville moved for judgment as a matter of law or a new trial. The district court denied the motions. On appeal, Nashville argues that the district court erred in denying its motion for judgment as a matter of law.

Denial of a motion for judgment as a matter of law under Federal Rule of Civil Procedure 50 is reviewed *de novo*. *Barnes v. City of Cincinnati*, 401 F.3d 729, 736 (6th Cir. 2005). In considering a motion for judgment as a matter of law, the court must construe the facts in the light most favorable to the non-moving party and grant the motion only if it concludes that there is no genuine issue of material fact for the jury because reasonable minds could only rule in favor of the moving party. *Id.*

Here, the district court found that the evidence presented at trial allowed the jury to conclude that Nashville had failed to accommodate McMahon's disability. The evidence showed that McMahon had worked

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as a registered nurse for Nashville beginning in 2006. In 2010, her supervisor began to harass and humiliate her in front of her co-workers. McMahon began to experience depression and anxiety. She took medical leave. Her medical providers recommended that she be moved out of the toxic work situation. McMahon was offered accommodation in the form of a position at a different location, which she accepted. She worked there successfully from July through September 2011. Nashville then transferred McMahon back to the original location, although not to a position under the harassing supervisor. McMahon told her supervisor at the alternate location that she wanted to stay, but that supervisor did not have authority to make the decision on where McMahon worked. McMahon was able to work at the original location for a month before an incident triggered a relapse in her mental state. She asked for leave of indefinite duration. Nashville responded that McMahon's paid leave was nearly exhausted. Although she was eligible for unpaid leave, Nashville denied her that privilege and informed her that if she did not return to work immediately at the expiration of her paid leave, she would be considered to have abandoned her position and be subject to dismissal. The district court found that this evidence justified the jury in concluding that Nashville had failed to accommodate McMahon's disability by denying her unpaid leave to recover her mental state.

On appeal, Nashville argues that it was entitled to judgment as a matter of law because McMahon was not qualified to perform her job, citing *Williams v.*

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AT&T Mobility Servs. LLC, 847 F.3d 384 (6th Cir. 2017). That case is not persuasive because McMahon demonstrated that she was qualified to perform her job, having successfully done so for four months before requesting leave. The employee in *Williams* had been essentially absent from her job for most of 18 months, her condition had not improved, and she did not suggest any accommodation that could render her able to work. McMahon, on the other hand, had recovered after her previous medical leave sufficiently to work for four months without problem. There was no basis to conclude that another period of leave would not restore her ability to return to work.

Nashville also argues that granting an indefinite amount of leave is not a reasonable accommodation, citing *Walsh v. UPS*, 201 F.3d 718, 727 (6th Cir. 2000). Again, that case is distinguishable. Walsh had taken a year of paid leave followed by six months of unpaid leave before requesting additional leave in excess of one year. Here, McMahon had been successfully performing her job for four months before requesting unpaid leave. Her medical providers did not estimate how long a leave period would be necessary, but Nashville also did not ask them to do so, instead denying McMahon any of the unpaid leave that she could have been provided. Nashville also argues that it should not have been required to propose a definite leave period. But Nashville informed McMahon that she had to return to work at the expiration of her paid leave, when it would have been no more of an imposition for

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Nashville to propose that McMahon had to return to work no later than the expiration of unpaid leave.

Finally, Nashville argues that McMahon cannot “travel on” her theory that Nashville’s failure to keep her assigned to the alternate location was a denial of reasonable accommodation. However, there is no need to reach this issue where the evidence presented at trial justified the jury in finding that the denial of unpaid leave was a failure to accommodate.

Because the evidence in this case was sufficient to support the jury’s ruling in favor of McMahon, we **AF-FIRM** the district court’s order denying the motion for judgment as a matter of law.

ENTERED BY ORDER
OF THE COURT

/s/ Deb S. Hunt
Deborah S. Hunt, Clerk

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

BEVERLY D. MCMAHON,	)	
Plaintiff,	)	
v.	)	
METROPOLITAN	)	NO. 3:13-cv-00319
GOVERNMENT OF	)	JUDGE CRENSHAW
NASHVILLE AND	)	
DAVIDSON COUNTY,	)	
TENNESSEE,	)	
Defendant.	)	

ORDER

(Filed Sep. 7, 2016)

Metro's motion for judgment as a matter of law (Doc. No. 103) is **DENIED**, McMahon's motions to alter judgment (Doc. No. 104), for attorney's fees (Doc. No. 107), and for supplemental attorney's fees (Doc. No. 122.) are **GRANTED IN PART** and **DENIED IN PART**.

The judgment on backpay damages (Doc. No. 98) is **AMENDED** to include 2% prejudgment interest.

McMahon is **AWARDED** reasonable attorney's fees in the amount of \$161,137.50, and costs in the amount of \$1,984.87.

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IT IS SO ORDERED.

/s/ Waverly D. Crenshaw, Jr.
WAVERLY D. CRENSHAW, JR.
UNITED STATES
DISTRICT JUDGE

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

BEVERLY D. MCMAHON,	)	
Plaintiff,	)	
v.	)	NO. 3:13-cv-00319
METROPOLITAN	)	JUDGE CRENSHAW
GOVERNMENT OF	)	
NASHVILLE AND	)	
DAVIDSON COUNTY,	)	
TENNESSEE,	)	
Defendant.	)	

MEMORANDUM OPINION

(Filed Sep. 7, 2016)

This matter came before the Court for a jury trial on June 14, 2016. Beverly McMahon alleged that the Metropolitan Government of Nashville and Davidson County, Tennessee (“Metro”), failed to accommodate her disability and constructively discharged her, in violation of the Americans with Disabilities Act, and further retaliated against her, in violation of Title VII of the Civil Rights Act of 1964. On June 16, 2016, the jury unanimously found that Metro failed to accommodate McMahon by a preponderance of the evidence. (Doc. No. 96 at 1.) The jury found in favor of Metro on the constructive discharge and retaliation claims. (*Id.*) Before the Court is Metro’s motion for judgment as a matter of law (Doc. No. 103) and McMahon’s motions to alter judgment to award prejudgment interest (Doc.

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No. 104), for attorney's fees (Doc. No. 107), and to supplement her motion for attorney's fees (Doc. No. 122.) For the following reasons Metro's motion (Doc. No. 103) is **DENIED**, and McMahon's motions (Docs. No. 104, 107, 122) are **GRANTED IN PART and DENIED IN PART**.

I. EVIDENCE AT TRIAL

In 2006, McMahon began working as a registered nurse clinical nurse with the Metro Public Health Department in the downtown clinic for the homeless. (Doc. No. 100 at 4.) In 2009, she transferred to Metro's sexually transmitted diseases ("STD") clinic. (*Id.*) At the STD clinic, Pam Trotter, who was the family practitioner on the floor, supervised the nurses. (*Id.* at 6.) Trotter reported to Rebecca Ritchey and Brad Beasley, who was the director of the program. (*Id.*) Beasley reported to Alisa Haushalter, who was the bureau head. (*Id.*)

A. MCMAHON'S WORK AT THE STD CLINIC

McMahon is a lesbian, and preferred to keep her sexual orientation private. (*Id.* at 7.) She did not disclose this information to her coworkers at the homeless clinic or the STD clinic. (*Id.*) At some point, another nurse at the STD clinic revealed that she was homosexual. (*Id.*) McMahon made the decision to reveal her sexual orientation to that nurse in confidence. (*Id.*) However, Pam Trotter overheard that conversation. (*Id.*) McMahon asked Trotter to not divulge that

information to anybody, especially Ritchey. (*Id.*) Trotter told the very people McMahon asked her not to tell, including Ritchey, about McMahon's sexual orientation. (*Id.* at 8.)

Trotter made McMahon feel uncomfortable in many ways. She knew McMahon was raised Catholic, and one day asked in front of multiple people, "Why would you – a Catholic lesbian go to a Catholic church during Holy Week?" (*Id.* at 6.) She used sexually explicit language to tell stories about her activities with her boyfriend. (*Id.* at 8.) When McMahon was learning new skills at work, Trotter would call her "stupid." (*Id.* at 9.) McMahon sometimes bought clothes at a local thrift store, which Trotter said was "nasty and dirty." (*Id.* at 10.) Ritchey agreed that McMahon should not buy "used dirty clothes." (*Id.*) Trotter told Ritchey and multiple other people that McMahon was bipolar and should be on medications. (*Id.*)

McMahon testified that Trotter's treatment of her caused her to be depressed. (*Id.* at 12.) She did not want to go to work, had headaches, nausea, anxiety, fear, and fatigue. (*Id.*)

McMahon also had some trouble doing her job while at the STD clinic. At one point, she gave someone the wrong medication. (*Id.* at 13-14.) For that, Trotter gave her an unofficial write-up that was only seen by the two of them. (*Id.* at 14.) Another time, McMahon gave a patient an injection containing a drug to which he was allergic. (*Id.* at 14-15.) In a third incident, McMahon gave a lady who was breast-feeding a fungal

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cream that should not be given to breast-feeding women. (*Id.* at 16.) Later on, Trotter noticed that the box did not contain a caution for breastfeeding women, but nonetheless referred McMahon to the clinic administrator. (*Id.*) McMahon testified that the administrator suspended McMahon for two days without pay and placed her on a performance improvement plan. (*Id.*) However, Leslie Robeson, the HR manager at the Metro Public Health Department, testified that Beasley granted McMahon two days of administrative leave. (Doc. No. 101 at 72, Tr. Ex. 22.) For her performance improvement plan, McMahon was supposed to work closely with Trotter for ninety days, coordinating lunches to ensure that McMahon was not left alone in the clinic. (*Id.* at 16-17.)

On March 28, 2011, McMahon had already started receiving mental health counseling from Erin Frazier-Maskiell, LPC, MHSP. (Tr. Ex. 3.) After her administrative leave, McMahon took family medical leave for her mental health. (Doc. No. 100 at 18-20.) After discussing with Beasley her situation, McMahon wrote him a letter, dated June 17, 2011. (Tr. Ex. 13.) In her letter, she explained her complaints about Trotter and requested that Metro transfer her “to a full-time job in another department or clinic within Metro that is similarly suited to my education and experience, and where I do not have to work with Pam Trotter.” (*Id.* at 3.) She specifically stated that she would consider a “position at the main health department” (the “Lentz Clinic”), where the STD clinic was located, “or possibly at the Woodbine facility.” (*Id.*) She asked that she not

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work in pediatrics, and that the position require at least a Registered Nurse degree. (*Id.*)

McMahon's doctor, Cynthia A. Janes, M.D., approved McMahon to return to work on July 5, 2011. (Tr. Ex. 2.) Dr. Janes stated that she felt "strongly that Ms. McMahon should not return to the same clinic that she was previously at, but to a different clinic." (*Id.*) In a July 1, 2011 letter to McMahon's counsel, Counselor Frazier-Maskiell wrote that she believed that if Metro placed McMahon in a "different environment, the symptoms [she] has been experiencing will decrease significantly as they are the result of a toxic situation." (Tr. Ex. 3.)

After returning from her family medical leave on July 5, 2011, McMahon returned to the STD clinic for five days. (Doc. No. 100 at 23.) Upon returning, her administrator told her that she had to fill out an employee evaluation by the end of the day. (*Id.* at 24.) Beasley and Ritchey did not allow her to go home at lunch to collect information she needed to complete her evaluation, but they did allow her to turn in an amended evaluation the following Monday. (*Id.*) That Monday morning, Beasley and Ritchey called McMahon into Beasley's office. (*Id.* at 25.) Beasley stated that there were no problems with McMahon's addendum, but then he leaned in toward McMahon in a manner McMahon perceived as threatening and told her that he took offense to McMahon's motorcycle helmet sticker that she mentioned earlier that day. (*Id.*; Tr. Ex. 18.) The helmet sticker stated "My boss is a A-hole." (Doc. No. 100 at 52.) McMahon responded that she felt

offended by some things that Beasley did when they were out in public. (*Id.* at 26.)

After the meeting with Beasley and Ritchey, McMahon left without finishing her work shift. (*Id.*) Her mental health continued to deteriorate. (*Id.*) She constantly second-guessed herself, had no confidence, felt anxious and that she was being scrutinized. (*Id.*) She had a headache, nausea, and constant fear. (*Id.*) She called her psychiatrist to make an appointment, and went to the Equal Employment Opportunity Commission to file a charge. (*Id.* at 27.) This charge, dated July 19, 2011, claimed that Metro discriminated against her because of her sex and religion and retaliated against her for opposing unlawful employment practices. (Tr. Ex. 18.) McMahon elected to take more family medical leave. (Doc. No. 100 at 27.)

On July 21, 2011, Haushalter wrote a letter to McMahon offering a reasonable accommodation for her disability. (Tr. Ex. 4.) In her letter, Haushalter offered McMahon the only Public Health Nurse 2 position within the Metro Public Health Department that was available at the time, which was at the Woodbine Clinic. (*Id.*) Prior to the letter, she spoke with McMahon on the phone. (Doc. No. 100 at 55.) In that phone conversation, McMahon offered work in to the occupational health clinic at Lentz, but there were no positions available. (*Id.*) After discussing with Haushalter her concerns about working with children, McMahon agreed to take the position “to get out of Lentz.” (*Id.* at 29-30.)

B. MCMAHON'S WORK AT WOODBINE

After McMahon returned to work on July 25, 2011, she began to gain confidence while working at Woodbine. (*Id.* at 32-33.) In order to create the position at Woodbine, Metro transferred Nurse Mary Swick to the Lentz Clinic. (*Id.* at 33.) McMahon worked with Kitty Miller, the preceptor, who showed McMahon certain techniques to make her job easier and less stressful. (*Id.* at 32.) McMahon volunteered to stay late and help with the late clinics. (*Id.* at 33.) She never missed a day working at Woodbine and really enjoyed the work. (*Id.*) Her mental health began improving, and she started to see Counselor Frazier-Maskiell on a biweekly basis, rather than on a weekly basis. (*Id.* at 35.)

After working at Woodbine for a couple of months, Carlin FanFan, McMahon's supervisor at Woodbine, wrote an evaluation of McMahon because it was the end of her performance improvement plan. (*Id.* at 37.) Soon after, FanFan told McMahon that she would be reassigned to the Lentz Clinic. (*Id.*) FanFan told McMahon that Swick wanted to come back to Woodbine. (*Id.* at 69.) McMahon told FanFan that she would prefer to stay at Woodbine and away from Trotter, but FanFan did not have any control over employee assignments. (*Id.* at 38.) That day, McMahon left work three hours early and went to see her doctor. (*Id.* at 39.) She had anxiety, fear, and was shaking. (*Id.*)

FanFan testified that the original plan was always for her to supervise McMahon during her performance improvement plan, and then transfer McMahon to the

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preventative health clinic at Lentz. (Doc. No. 101 at 65.) FanFan asked Swick to volunteer to go to Lentz for a few months, but promised it would not be longer than three months. (*Id.* at 66.) Swick did not want to stay at Lentz for very long. (*Id.*)

Tatum Johnson, the charge nurse at the preventative health and women's health clinic, testified that McMahon was only supposed to train at Woodbine under her performance improvement plan before transferring permanently to Johnson's clinic. (Doc. No. 101 at 52.) She testified that she was on maternity leave during the time McMahon was on her performance improvement plan and there was no supervising nurse at her clinic, so McMahon could not complete her performance improvement plan at that clinic. (*Id.*; *id.* at 62.) Johnson testified that Swick volunteered to work at Lentz in order to facilitate McMahon's training at Woodbine. (*Id.* at 55.)

Robeson testified that the only open position that had funding from the Metro Finance Department was the position at the preventative health clinic at Lentz. (*Id.* at 79.) However, because Johnson was on maternity leave, there was no charge nurse at the preventative health clinic to supervise McMahon, as required by her performance improvement plan. (*Id.* at 83.) Swick did not want to move to Lentz permanently, and the money that Metro Finance gave Metro Health for the position at Lentz was for a registered nurse, which Swick was not. (*Id.* at 84.) Robeson testified that McMahon did the same work at the Lentz preventative health clinic as she did at Woodbine. (*Id.* at 85.) There

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was no difference in pay, benefits, or seniority between the two jobs. (*Id.* at 85.) McMahon never contacted Robeson after FanFan told her that Metro was transferring her back to Lentz to ask to stay at Woodbine. (*Id.* at 86.)

C. MCMAHON'S RETURN TO LENTZ

When McMahon reported to Lentz, Metro assigned her to the preventative health and women's health clinic, supervised by Johnson. (Doc. No. 100 at 39.) This clinic was next door to the STD clinic.¹ (*Id.*) While at the preventative health clinic, McMahon's previous symptoms of anxiety resurfaced. (*Id.* at 40.) When she saw Trotter, she felt worse. (*Id.*) She testified that her heart started racing, she broke out in a sweat, her hands were shaking, and she wanted to run out of the building. (*Id.*)

While at Lentz, McMahon enjoyed having lunch with one of her friends from another clinic that she knew from her time working at the homeless clinic. (*Id.* at 40-41.) One day in late-October, Johnson called McMahon into her office and told her that she was no longer allowed to leave her clinic to have lunch in other clinics. (*Id.* at 41.) McMahon protested that it was common occurrence for nurses to have lunch with other nurses at different clinics, but Johnson told her that this order came from her supervisor based on

¹ Johnson testified that the two clinics are both on the "first floor of the old building, but on opposite ends of the hallway." (Doc. No. 101 at 54.)

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second-hand knowledge of McMahon talking about her cases with other nurses. (*Id.* at 41-42.) McMahon was very upset with what she perceived to be Metro's harassment and retaliation against her, so she filled out an "injury on duty" report and left the clinic. (*Id.* at 42.)

Johnson testified that some complaints had been made about disruption in the occupational health clinic because McMahon often went into the clinic where the nurses kept the patients' charts. (Doc. No. 101 at 57.) The director over the bureau that contained the occupational health clinic asked Johnson's supervisor to speak to Johnson about McMahon's "disruption" in the clinic. (*Id.*) Johnson testified that she talked to McMahon and then they both went back to work. (*Id.*) A few days later, Johnson received a doctor's note from McMahon's doctor, and McMahon never returned to work. (*Id.*)

On November 8, 2011, Robert Jamieson, M.D., wrote a letter to Metro stating that he had been treating McMahon for a major depressive illness since October 4, 2011. (Tr. Ex. 8.) He requested that McMahon be excused from work beginning on November 3, and stated that "it is not possible to predict when she will be able to return to work." (*Id.*) Also on November 8, 2011, Counselor Frazier-Maskiell wrote a letter to Metro stating that she had been treating McMahon for "high intensity stress." (Tr. Ex. 9.) That letter also recommended that McMahon "takes some time off work to get her emotional state under control." (*Id.*)

On November 14, 2011, the Director of Health at Metro, William S. Paul, MD, MPH, responded to McMahon's request for "additional leave without pay." (Tr. Ex. 10.) He stated in a letter to her that the Civil Service Rules permit him to grant up to 120 days of additional leave without pay. (*Id.*) He did not offer her any definite amount of leave without pay, but only denied her request for an "indefinite duration." (*Id.*) He could not approve her request for indefinite leave because he needed "to have someone working in this nursing position." (*Id.*) He recognized that denying this leave could lead to an end to McMahon's employment, but invited her to reapply for a position after she had recovered from her illness. (*Id.*) Paul testified that he made the decision to deny McMahon's request for unpaid leave because Metro had clinical operations to run, and it would be "difficult for the department to continue operations" with a nurse on leave without a known end date. (Doc. No. 101 at 8.) Johnson confirmed that she saw thirty-to-fifty patients per day, and they needed a nurse to fill the vacancy. (*Id.* at 53.)

On November 23, 2011, Paul wrote a letter to McMahon stating that she has "failed to report to [her] work assignment without prior approval," which constitutes "job abandonment." (Tr. Ex. 11.) Paul charged her with "[i]nability to perform duties, when reasonable accommodation has been considered and cannot be made." (*Id.* at 2.) Paul testified that the reasonable accommodation he considered was the request for indefinite leave. (Doc. No. 101 at 10.) He told McMahon that he would conduct a hearing on December 2, 2011, at

2:00pm to determine “if the charges are valid, and what, if any, discipline is appropriate.” (Tr. Ex. 11 at 2.) “Disciplinary action could be demotion, suspension or dismissal.” (*Id.*) McMahon resigned prior to the hearing because she did not want an involuntary employment termination on her record. (Doc. No. 100 at 47.)

II. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 50(b), a court may grant a renewed motion for judgment as a matter of law “only if in viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact for the jury, and reasonable minds could come to but one conclusion, in favor of the moving party.” *Radvansky v. City of Olmsted*, 496 F.3d 609, 914 (6th Cir. 2007). The party seeking a judgment as a matter of law must “overcome the substantial deference owed a jury verdict.” *Id.* The court may not “reweigh the evidence or assess the credibility of witnesses.” *Id.*

Federal Rule of Civil Procedure 59(a)(1)(A) allows a court to grant a new trial on some or all of the issues after a jury trial “for any reason for which a new trial has heretofore been [sic] granted in an action at law in federal court. . . .” Generally, a district court should grant a motion for a new trial only “when a jury has reached a ‘seriously erroneous result’ as evidenced by: (1) the verdict being against the weight of the evidence; (2) the damages being excessive; (3) the trial being unfair to the moving party in some fashion, i.e., the proceedings being influenced by prejudice or bias.”

Mitchell v. Boelcke, 440 F.3d 300, 303 (6th Cir. 2006) (quoting *Holmes v. City of Massillon, Ohio*, 78 F.3d 1041, 1045-46 (6th Cir. 1996)). The burden of demonstrating the necessity of a new trial is on the moving party, and the ultimate decision of whether to grant such relief is a matter vested within the sound discretion of the district court. *Clarksville-Montgomery Co. Sch. Sys. v. U.S. Gypsum Co.*, 925 F.2d 993, 1002 (6th Cir. 1991).

III. RULE 50 AND 59

Metro argues: (1) McMahon did not raise a failure to accommodate claim in her complaint, (2) McMahon was not otherwise qualified, and (3) Metro provided a reasonable accommodation to McMahon as a matter of law. Metro raised the first argument in its motion for summary judgment, which the Honorable William J. Haynes, Jr., adopting the Report and Recommendation from the Honorable Barbara Holmes, denied. (Doc. No. 42 at 12-13 (adopted in Doc. No. 49)). The Court denies this claim for the same reasons as the other two judges who previously considered it.

To prove disability discrimination using indirect evidence under the ADA, the Court uses the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), burden-shifting framework. *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1178 (6th Cir. 1996). “To establish a claim for disability discrimination under the indirect method, a plaintiff must first establish a *prima facie* case of discrimination by showing that (1) he or she is

disabled, (2) he or she is otherwise qualified for the position, with or without reasonable accommodation, (3) he or she suffered an adverse employment decision, (4) the employer knew or had reason to know of the plaintiff's disability, and (5) the position remained open while the employer sought other applicants or the disabled individual was replaced." *Ferrari v. Ford Motor Co.*, ___ F.3d ___, 2016 WL 3443646, at *4 (6th Cir. 2016) (citing *Monette*, 90 F.3d at 1178). The fifth element "may also be satisfied by showing that similarly situated non-protected employees were treated more fairly." *Jones v. Potter*, 488 F.3d 397, 404 (6th Cir. 2007) (quoting *Talley v. Bravo Pitino Rest., Ltd.*, 61 F.3d 1241, 1246 (6th Cir. 1995) (overruled on other grounds)).

Metro argues that McMahon was not "otherwise qualified" because attendance at work is a necessary job function. (Doc. No. 103 at 5.) It is indeed, but this is not a case of separate and distinct requests for accommodation. Plaintiff's theory at trial was that Metro accommodated Plaintiff when it moved her to Woodbine. Metro had the right to transfer her and did so when Plaintiff was returned to Lentz. However, it is undisputed that Plaintiff's mental impairments persisted after the transfer to Lentz, just as they existed before the move to Woodbine. Metro then rejected, as it should, her unreasonable request for indefinite leave and failed to offer any other accommodation, which was available through definite unpaid leave. The jury reasonably could find, and did find, McMahon was qualified to work if Metro had granted her a definite amount of unpaid leave.

Metro argues that McMahon should not have been permitted to present to the jury that she requested that she not be moved back to Lentz. (*Id.*) The evidence at trial did not show that McMahon requested to stay at Woodbine rather than transfer to Lentz. In fact, it affirmatively showed that, while McMahon did not want to go back to Lentz because she fit in at Woodbine, she never asked anyone with authority to stay at Woodbine. The evidence gathered from the transfer of McMahon to Lentz was evidence that McMahon's mental health deteriorated at the time she was transferred back to Lentz, necessitating that she take leave from work. This evidence was relevant to McMahon's failure to accommodate claim.

Metro argues that McMahon's request for indefinite leave is not reasonable, and it was not required to grant that request without knowing the expected duration of her impairment. (*Id.* at 6.) It is true that a request for indefinite leave is not reasonable. *Harris v. Circuit Court, Clerk's Office, Metro. Nashville*, 21 Fed. Appx. 431, 732 (6th Cir. 2001). However, the employer "need not provide the accommodation that the employee requests or prefers." *Trepka v. Bd. of Ed.*, 28 Fed. Appx. 455, 459 (6th Cir. 2002). If the employee's accommodation request is unreasonable, "the employer retains the 'ultimate discretion' to choose another effective accommodation." *Johnson v. Cleveland City School Dist.*, 443 Fed. Appx. 974, 984 (6th Cir. 2011). In fact, Metro had already done this once when McMahon offered to work at the occupational health clinic, but

instead Metro assigned her to the preventative health clinic.

Here, Metro denied McMahon's request for indefinite leave and did not award her any reasonable accommodation, although it admits it could have offered McMahon up to 120 days of unpaid leave as an accommodation. As a matter of law, definite unpaid leave may be a reasonable accommodation. *Cehrs v. Ne. Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 783 (6th Cir. 1998). With the additional leave, a reasonable jury could find that McMahon was qualified for her job. McMahon excelled at her position at Woodbine, and her position at the preventative health clinic at Lentz had essentially the same job functions. After a mental health break, a reasonable jury could find that McMahon was reasonably qualified to work as a nurse at the preventative health clinic at Lentz. The evidence is sufficient to show that a reasonable jury could and did conclude that Metro did not carry its burden of providing a reasonable accommodation to McMahon.

The remainder of Metro's argument involves the transfer of McMahon from Woodbine to Lentz. As discussed above, McMahon never told anyone that she needed to be at Woodbine because of her disability – she only told FanFan that she preferred to stay at Woodbine because she was doing well in her position there. This is not sufficient for a failure to accommodate claim. However, the jury's verdict is supported by Metro's denial of McMahon's request for unpaid leave without discussing any reasonable accommodations

with McMahon. Therefore, the evidence supports the jury's finding on the reasonable accommodation claim.

IV. PRE-JUDGMENT INTEREST

McMahon asks the Court to award pre-judgment interest on both the emotional distress damages and McMahon's backpay. (Doc. No. 104) She asks for an annual rate of 5% to compensate her for inflation and the lost time value of the money. Metro concedes that McMahon is entitled to pre-judgment interest regarding backpay, but contests her motion for pre-judgment interest regarding her emotional distress damages. (Doc. No. 111.) Further, Metro asks that the Court apply the 0.59% interest rate contained in 28 U.S.C. § 1961.

The Court finds persuasive the dicta in *Lensing v. Potter*, No. 1:03-cv-575, 2013 WL 209604, at *5 (W.D. Mich. Jan. 17, 2013). The court analyzed multiple cases in this circuit, other circuits, and the Supreme Court, and determined that pre-judgment interest should not be awarded on emotional distress damages because "prejudgment interest awards are governed by common law principles" and common law principles do not allow for prejudgment interest to be added to unliquidated damages. *Id.* (and all cited cases). Further, in this case, the Court instructed the jury to award emotional distress damages that are "fair compensation – no more and no less." (Doc. No. 97 at 50.) The jury determined that \$160,000 was fair compensation for the emotional distress that Metro caused McMahon at the

time of the verdict. (Doc. No. 96 at 2.) This amount fairly compensates McMahon, and the Court denies her motion to add prejudgment interest on the emotional distress award.

As to the pre-judgment interest rate for McMahon's backpay award, the Court finds persuasive the "congressional wisdom expressed in . . . 28 U.S.C. § 1961(a)," but notes that it is not "invariably compelled to adopt the statutory postjudgment rate in determining prejudgment interest." *E.E.O.C. v. Wooster Brush Co. Employees Relief Ass'n*, 727 F.2d 566, 579 (6th Cir. 1984). The district court abuses its discretion if it calculates the prejudgment interest using a single rate "at the time of award under § 1961." *Hi-Lex Controls, Inc. v. Blue Cross Blue Shield of Michigan*, 751 F.3d 740, 751 (6th Cir. 2014). In this case, it appears that the interest rate of 0.69% is sufficient to compensate McMahon for inflation, but because the inflation rate is so low, it is insufficient to compensate McMahon for the lost time value of her backpay award. The Court therefore sets the prejudgment interest rate at 2%, which adequately compensates Plaintiff for the lost time value of her wages.

Based on the foregoing, the Court grants Plaintiff's motion to amend the judgment and add prejudgment interest to the jury's backpay award. The judgment in favor of McMahon and against Metro is amended to include 2% prejudgment interest on the backpay award.

V. ATTORNEY’S FEES

McMahon asks for \$178,245.00 in attorney’s fees, \$1,984.87 in nontaxable expenses, and an additional \$21,420.00 in attorney’s fees for work on post-judgment motions. (Doc. No. 108; Doc. No. 122.) In support, she offers an itemized list of hours and multiplies the number of hours she worked by \$450, which she believes is a reasonable hourly rate for the district. (*Id.*; Doc. No. 109-5; Doc. No. 109-6; Doc. No. 109-7; Doc. No. 109-8.) Metro argues that McMahon can only recover attorney’s fees at the attorney’s actual disclosed rate in this case, which is \$325 per hour initially, and \$375 per hour at trial and after. (Doc. No. 112 at 1.) Additionally, Metro asks the Court to reduce the number of hours spent by 31.3 hours because those hours were prior to the filing of the complaint. (*Id.*)

A court may, “in its discretion, . . . allow the prevailing party . . . a reasonable attorney’s fee, including litigation expenses, and costs. . . .” 42 U.S.C. § 12205 (2006). A reasonable attorney fee is calculated by the lodestar method. *The Northeast Ohio Coalition for the Homeless v. Husted*, ___ F.3d ___, 2016 WL 4073489, at *10 (6th Cir. 2016).² “The lodestar is ‘the number of hours reasonably expended on the litigation multiplied by a reasonabl[e] hourly rate.’” *Id.* (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)).

² Courts are to treat all fee-shifting statutes awarding attorney’s fees to prevailing parties the same. *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 602-03 (2001).

In determining hours, a court must “exclude from this initial fee calculation hours that were not reasonably expended.” *Id.* (quoting *Hensley*, 461 U.S. at 434). Fee applicants “must exercise ‘billing judgment.’” *Id.* (quoting *Hensley*, 461 at 437). Counsel shall “exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission.” *Id.* (quoting *Hensley*, 461 U.S. at 434).

The only prevailing claim in this case is a failure to accommodate claim stemming from Metro’s denial of McMahon’s request for unpaid leave in November 2011. All work prior to that request is so ancillary from the case that it should be excluded. Therefore, the Court reduces the number of hours reasonably expended by fourteen hours to 429.7 total hours.

“To determine a reasonable hourly rate, courts use as a guideline the prevailing market rate, which is defined as ‘the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record.’” *The Northeast Ohio Coalition for the Homeless*, 2016 WL 4073489, at 20. While the “district court may take into consideration an attorney’s skill level in identifying the market rate, . . . ‘reasonable’ fees need not be ‘liberal’ fees, and . . . ‘[s]uch fees are different from the prices charged to well-to-do clients by the most noted lawyers and renowned firms in a region.’” *Id.* (quoting *Coulter v. State of Tenn.*, 805 F.2d 146, 149 (6th Cir. 1986)).

Here, counsel for McMahon presented affidavits from other Plaintiff's lawyers in Nashville to determine that \$450 per hour is a reasonable rate. However, none of those attorneys even stated that a court had awarded them \$450 per hour. Randall Burton claimed that a court in the Middle District of Tennessee awarded him \$395 per hour, and Stephen Grace claimed that a court in the Middle District of Tennessee awarded him \$425 per hour. Neither proposed-comparator compared the complexity or result of the cases in which the court awarded them attorney's fees with McMahon's case. Based on the complexity of the case, taking into account that Mr. Winters has less experience in employment matters than the proposed-comparators – although he has more overall litigation experience – the Court finds that Mr. Winters's disclosed rate of \$375 per hour is a reasonable rate for this litigation.

After multiplying the 429.7 reasonable hours by the reasonable market rate of \$375 per hour, the Court finds that \$161,137.50 in attorney's fees is reasonable in this case.

VI. CONCLUSION

For the foregoing reasons, Metro's motion for judgment as a matter of law (Doc. No. 103) is **DENIED**, McMahon's motions to alter judgment (Doc. No. 104), for attorney's fees (Doc. No. 107), and for supplemental attorney's fees (Doc. No. 122.) are **GRANTED IN PART** and **DENIED IN PART**.

App. 29

The Court will enter an accompanying order.

/s/ Waverly D. Crenshaw, Jr.
WAVERLY D. CRENSHAW, JR.
UNITED STATES DISTRICT JUDGE

App. 30

No. 16-6498

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BEVERLY D. McMAHON,	)	
Plaintiff-Appellee,	)	
v.	)	ORDER
METROPOLITAN	)	(Filed Nov. 9, 2017)
GOVERNMENT OF	)	
NASHVILLE AND	)	
DAVIDSON COUNTY,	)	
TENNESSEE,	)	
Defendant-Appellant.	)	

BEFORE: KETHLEDGE, WHITE, and STRANCH,
Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

**ENTERED BY ORDER
OF THE COURT**

/s/ Deb S. Hunt
Deborah S. Hunt, Clerk
