FILED
United States Court of Appeals
Tenth Circuit

September 22, 2017

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JEANNETTE A. SUAREZ,

Plaintiff - Appellant,

v.

ANTHEM, INC., f/k/a WellPoint,

Defendant - Appellee.

No. 17-1073
(D.C. No. 1:15-CV-01082-RM-MJW)
(D. Colo.)

ORDER AND JUDGMENT*

Before **KELLY**, **MURPHY**, and **MATHESON**, Circuit Judges.**

Plaintiff-Appellant Jeannette Suarez, appearing pro se, appeals from the district court's grant of summary judgment in favor of Defendant-Appellee Anthem, Inc. ("Anthem") on her Americans with Disabilities Act ("ADA") claims. The parties are familiar with the facts and we need not restate them here. The district court adopted the report and recommendation of the magistrate judge after considering Ms. Suarez's objections. Although Anthem objected on the grounds that the objections were untimely,

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

the district court ruled that "it is not perfectly clear from the record when plaintiff was served with the R&R, thus triggering the time to object. Based upon its own review, the Court does not consider plaintiff's objections to be untimely." I R. 659. Though we doubt that "perfect clarity" as to service is required, the district court made no findings to suggest that the date of service was anything other than what the court's records indicated.

On appeal, Anthem argues that Ms. Suarez waived review not only by failing to file an opposition to its summary judgment motion, but also by failing to timely object to the magistrate judge's report and recommendation. We consider the latter point first.

A review of the district court docket sheet and the notice of electronic filing reflects that the report and recommendation was mailed to Ms. Suarez on August 23, 2016; hence service was complete upon mailing.[1] Fed. R. Civ. P. 5(b)(2)(C). At most, Ms. Suarez had 14 days plus three days mailing (until August 9, 2016) to file her objections. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 6(d). She did not file her objections until September 16, 2017. Ordinarily, her objections would be untimely.

However, on August 7, 2016, the district court entered a text only order (in the course of resolving another motion) "reminding" Ms. Suarez that she had 14 days from <u>receiving</u> the report and recommendation to object. Of course, this is inconsistent with Fed. R. Civ. P. 72(b)(2) and 28 U.S.C. §636(b)(1), which start the 14-day period running upon service, not receipt. While the district court has the power to extend to the time sua

[1] In addition, Anthem states that it emailed a copy of the report and recommendation to Ms. Suarez on August 23, 2016.

sponte before the time period has run, Fed. R. Civ. P. 6(b)(1)(A), that is not what happened here.

Ms. Suarez indicates that she received the report and recommendation on September 2, 2016, and filed her objections on September 16, 2016. Given the district court's order suggesting that this was appropriate and her possible reliance on that order, we will not construe Ms. Suarez's objections as untimely.

That said, we affirm for substantially the same reasons set forth in the magistrate judge's report and recommendation and the district court's order rejecting Ms. Suarez's challenges. We agree with Anthem that Ms. Suarez's opening submission is noncompliant with Fed. R. App. P. 28 and lacks substantive argument, citations to the record, and legal authority in support of her claims. Though she is pro se, she still must adhere to the rules. Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 840–841 (10th Cir. 2005).

AFFIRMED. Given the lack of a rational argument on the law and the facts on appeal, we DENY IFP status. All other pending motions are denied.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Raymond P. Moore

Case No. 15-cv-01082-RM-MJW

JEANNETTE A. SUAREZ,

Plaintiff,

v.

ANTHEM, INC., *formerly known as* WELLPOINT,

Defendant.

ORDER

Pending before the Court is the August 23, 2016 Report and Recommendation ("R&R") from U.S. Magistrate Judge Michael J. Watanabe (ECF No. 103), recommending granting defendant Anthem, Inc.'s ("defendant") motion for summary judgment ("the motion for summary judgment") (ECF No. 70), and entering judgment in defendant's favor.

The Magistrate Judge advised the parties that they had 14 days from service in which to file specific, written objections to the R&R in order to preserve issues for *de novo* review. (*Id.* at 12-13.) Twenty-four days after the R&R was filed, *pro se* plaintiff Jeannette A. Suarez ("plaintiff") filed objections to the R&R.[1] (ECF No. 109.) At the same time as filing her objections, plaintiff also filed a motion for summary judgment. (ECF No. 110.) In addition, further pending before the Court is plaintiff's motion for status of summary judgment. (ECF No. 119.)

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[1] Although defendant asserts that the deadline to object was September 6, 2016 (ECF No. 113 at 2), it is not perfectly clear from the record when plaintiff was served with the R&R, thus triggering the time to object. Based upon its own review, the Court does not consider plaintiff's objections to be untimely.

I. Review of a Magistrate Judge's Report and Recommendation

A district court may refer pending motions to a magistrate judge for entry of a report and recommendation. 28 U.S.C. §636(b)(1)(B); Fed. R. Civ. P. 72(b). The court is free to accept, reject, or modify, in whole or in part, the findings or recommendations of the magistrate judge. 28 U.S.C. §636(b)(1); Fed. R. Civ. P. 72(b)(3). A party is entitled to a *de novo* review of those portions of the report and recommendation to which specific objection is made. *See* Fed.R.Civ.P. 72(b)(2), (3). "[O]bjections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review." *United States v. 2121 E. 30 St.*, 73 F.3d 1057, 1060 (10th Cir. 1996); *see also Summers v. Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991) ("In the absence of timely objection, the district court may review a magistrate's report under any standard it deems appropriate.").

II. Plaintiff's Objections to the R&R

As an initial matter, the Court notes that plaintiff's objections relate *only* to the Magistrate Judge's factual findings. (*See generally* ECF No. 109.) In other words, plaintiff does not specifically object to any of the Magistrate Judge's legal conclusions, including, most notably, the Magistrate Judge's conclusions that plaintiff failed to raise genuine issues of material fact with respect to her reasonable accommodation and harassment claims.

Nonetheless, even if the Court were to assess plaintiff's objections to the Magistrate Judge's factual findings, they are without merit and/or not supported. First, it is necessary to note that plaintiff does not object to all of the Magistrate Judge's factual findings. For example, plaintiff does not object to the Magistrate Judge's findings that plaintiff failed to achieve a "satisfactory" score in two required tests. (ECF No. 109 at 4-5.) This was a finding that formed part of the Magistrate

Judge's conclusion that plaintiff failed to raise a genuine issue of material fact that she could perform her job with or without an accommodation. (*See* ECF No. 103 at 10-11.)

Second, many of the objections plaintiff does raise are unsupported by any evidence. For example, plaintiff disputes that her instructor found her to be disruptive. (ECF No. 109 at 2.) In response, plaintiff states that she "was never *told*" that she was disruptive. (*Id.* (emphasis added)). Apart from the fact that, just because plaintiff was never told she was disruptive does not mean that her instructor did not find her to be so, plaintiff does not offer any evidence to support her response. (*See id.*) The same is true of plaintiff's dispute with the finding that her instructor did not remove note-taking materials, in that plaintiff's dispute is again unsupported by evidence. (*See id.* at 3-4.)

As an another example, plaintiff disputes that, even though she never requested a specific accommodation from her instructor, her instructor offered accommodations. (ECF No. 109 at 3.) In response, plaintiff states: "Why would it cross [her instructor's] mind that I needed anything if I never asked her for help?" (*Id.*) Again, this response is unsupported. Moreover, plaintiff's response ignores the undisputed fact that her instructor knew that she had a disability. In addition, plaintiff's failure to properly challenge the Magistrate Judge's finding that she did not request any specific accommodations is important because it is another reason to find no genuine issue of material fact with respect to her reasonable accommodation claim. *See E.E.O.C. v. C.R. England, Inc.*, 644 F.3d 1028, 1049 (10th Cir. 2011) (explaining that, "before an employer's duty to provide reasonable accommodations … is triggered under the ADA, the employee must make an adequate request, thereby putting the employer on notice.").

Third, when plaintiff does cite to evidence for support, that evidence does not support her position. For example, plaintiff disputes that she was allowed to take notes, citing a purported "statement" from Darlene Linan. (*See* ECF No. 109 at 3 (citing ECF No. 95-5)). Plaintiff cites the following statement: "One concern that Leesa Whitehead, the trainer had was that [plaintiff] was writing down everything she was saying word for word instead of listening to the content of the discussion and only taking notes for key points. Leesa thought it might be more beneficial for [plaintiff] to listen to what was being said, *then make notes* on what was relevant to her." (*See* ECF No. 109 at 3 (citing ECF No. 95-5 at 2) (emphasis added)). This statement confirms that plaintiff was allowed to take notes and that note-taking materials were not removed, contrary to plaintiff's contentions.

As an another example, plaintiff cites to a "Report of Psychological Evaluation and Fitness for Duty," prepared in December 2010. (*See* ECF No. 109 at 6 (citing ECF No. 95-17)). Plaintiff cites the following statement: "The key to her *day-to-day* psychological condition, and potential for deterioration, appears to be that is she does not feel 'supported,' she can tip over into a disorganized state, and becomes easily tearful. It is important to note that this is not a depressive reaction, for her, but an habitual reaction to environment stress that has developed and been reinforced for many years." (*See* ECF No. 109 at 6 (citing ECF No. 95-17 at 3) (emphasis added)). Plaintiff appears to argue that the consequences of her disability only occur when she is not supported by her family, rather than when she is working. (*See* ECF No. 109 at 6-7.) The psychological report contradicts this contention, however, given that the report states that the key to plaintiff's *day-to-day* condition is feeling supported.

In summary, plaintiff's objections to the R&R fail to properly object to the Magistrate Judge's factual findings and legal conclusions with respect to plaintiff's reasonable accommodation and harassment claims.[2] As a result, the Court rejects plaintiff's objections (ECF No. 109), and ADOPTS IN FULL the R&R (ECF No. 103).[3]

III. Conclusion

For the reasons discussed herein, the Court ADOPTS IN FULL the R&R (ECF No. 103). As a result, the Court:

GRANTS defendant's motion for summary judgment (ECF No. 70), and DISMISSES the Amended Complaint (ECF No. 27);

DENIES AS MOOT plaintiff's motion for summary judgment (ECF No. 110); and

GRANTS plaintiff's motion for status of summary judgment (ECF No. 119) to the extent that plaintiff's motion for summary judgment has been denied as moot.

The Clerk is instructed to Close this case and enter Judgment in defendant's favor.

SO ORDERED.

DATED this 8th day of February, 2017.

BY THE COURT:

RAYMOND P. MOORE
United States District Judge

[2] Unlike the reasonable accommodation claim, plaintiff's objections do not appear to contest the Magistrate Judge's findings and conclusions with respect to her harassment claim in any respect. In any event, the Court finds no error with respect to the harassment claim. Plaintiff acknowledges that the reason she was allegedly harassed was due to her correcting a superior's pronunciation of a Mexican restaurant's name. (*See* ECF No. 110 at 2.) As the Magistrate Judge found, plaintiff's harassment claim thus did not stem from any disability-related animus. (*See* ECF No. 103 at 11-12.)

[3] Although plaintiff has also filed a motion for summary judgment (ECF No. 110), nothing therein (which largely contains similar or the same arguments made in plaintiff's objections) changes the Court's adoption of the R&R. As a result, plaintiff's motion for summary judgment is DENIED AS MOOT.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-01082-RM-MJW

JEANNETTE A. SUAREZ,

Plaintiff,

v.

ANTHEM, INC.,

Defendants.

REPORT & RECOMMENDATION ON
MOTION FOR SUMMARY JUDGMENT (Docket No. 70)

MICHAEL J. WATANABE
United States Magistrate Judge

This case is before this Court pursuant to an Order Referring Case to Magistrate Judge issued by Judge Raymond P. Moore on June 23, 2015 (Docket No. 14) and the Memorandum (Docket No. 88) referring Defendant's Motion for Summary Judgment (Docket No. 70). The Court has reviewed the parties' filings, taken judicial notice of the Court's entire file in this case, and considered the applicable Federal Rules of Civil Procedure and case law. Now being fully informed the Court makes the following report and recommendation.

Procedural Background

On April 21, 2016, Defendant filed the Motion for Summary Judgment. (Docket No. 70.) Under D.C.COLO.LCivR 7.1(d), Plaintiff's[1] response to that motion was due

[1] The Court must construe the filings of a pro se litigant liberally. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (citations

May 12, 2016. Under Fed. R. Civ. P. 6(d), that response would have been deemed timely if received by the Court no later than May 16, 2016. On May 17, 2016, the Court received Plaintiffs [sic] Motion Requesting an Extension to Provide the Court Opposition to Defendants [sic] Motion for Summary Judgement [sic] (Docket No. 77), which was mailed on May 16, 2016 (Docket No. 77-1). In that motion, Plaintiff asked for a 7-day extension of her deadline to respond to the Motion for Summary Judgment. Judge Moore granted Plaintiff's request on May 18, 2016 (Docket No. 78). Plaintiff failed to file a response by the new deadline and on June 14, 2016, Defendant filed its reply noting that Plaintiff had not filed any response to the Motion for Summary Judgment (Docket No. 79). On June 17, 2016, Plaintiff filed her Motion Requesting a Second Extension to File My Motion for Opposition to Defendants [sic] Motion for Summary Judgment (Docket No. 81), requesting further extension of Plaintiff's response deadline. That request was opposed by Defendant (Docket No. 82). On June 27, 2016, Judge Moore granted Plaintiff a further extension of her deadline noting:

> [P]laintiff shall have one FINAL opportunity to respond to the motion for summary judgment. Plaintiff shall have until July 8, 2016 to respond and file a response statement of material facts in compliance with this Court's Civil Practice Standard IV.B . . . . **Should plaintiff fail to respond by July 8, 2016, the Court will deem the motion for summary judgment as unopposed.**

(Docket No. 83) (emphasis in original). On July 19, 2016, the Court received two further

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omitted). The Court, however, should not be the pro se litigant's advocate, nor should the Court "supply additional factual allegations to round out [the pro se litigant's] complaint or construct a legal theory on [his or her] behalf." *Whitney v. New Mexico*, 113 F.3d 1170, 1173-74 (10th Cir. 1997) (citing *Hall*, 935 F.2d at 1110). In addition, pro se litigants must follow the same procedural rules that govern other litigants. *Nielson v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994).

motions from Plaintiff regarding her deadline to respond to the Motion for Summary Judgment (Docket Nos. 84 & 85). That same day, Judge Moore ruled on both motions:

> This matter comes before the Court upon the filing of Plaintiff's motion for an extension of time to respond to the motion for summary judgment ("Motion One") (ECF No. 84) and motion for an extension of time to respond to the motion for summary judgment ("Motion Two") (ECF No. 85). Motion One (ECF No. 84) is DENIED AS MOOT, as plaintiff seeks an extension up to July 15, 2016 to file a response, which has come and gone. Motion Two (ECF No. 85) is GRANTED on the sole ground that it appears the Court failed to mail plaintiff a copy of its Order setting July 8, 2016 as the deadline to file a response. Due to this oversight, plaintiff shall have until July 20, 2016 to file a response. This Order will be mailed to plaintiff by the Court, however, irrespective of whether she receives it by July 20, 2016, her response will be due by July 20, 2016 (the date that she requested). As the Court stated last time, should plaintiff fail to file her response by July 20, 2016, defendant's motion for summary judgment will be deemed unopposed, and considered on that basis.

(Docket No. 86).

Plaintiff did not file a response to the Motion for Summary Judgment by July 20, 2016. Accordingly, Plaintiff has confessed the motion. *See Walter v. HSM Receivables*, No. 13-cv-00564-RM-KLM, 2014 WL 5395197, at *1 (D. Colo. Oct. 23, 2014) ("The Motion is essentially unopposed as no response has been filed by Defendants."); *Armstrong v. Swanson*, No. 08-cv-00194-MSK-MEH, 2009 WL 1938793, at *1 (D. Colo. July 2, 2009) (noting that Plaintiff did not file a response to the motion for sanctions and "deem[ing] the Plaintiff to have defaulted on th[e] motion."). However,

> [s]ummary judgment is not proper merely because [Plaintiff] failed to file a response. Before the burden shifts to the nonmoving party to demonstrate a genuine issue, the moving party must meet its "initial responsibility" of demonstrating that no genuine issue of material fact exists and that it is entitled to summary judgment as a matter of law.

Reed v. Bennett, 312 F.3d 1190, 1194 (10th Cir. 2002) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). As the Tenth Circuit has explained,

> a party's failure to file a response to a summary judgment motion is not, by itself, a sufficient basis on which to enter judgment against the party. The district court must make the additional determination that judgment for the moving party is "appropriate" under Rule 56. Summary judgment is appropriate only if the moving party demonstrates that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. By failing to file a response within the time specified by the local rule, the nonmoving party waives the right to respond or to controvert the facts asserted in the summary judgment motion. The court should accept as true all material facts asserted and properly supported in the summary judgment motion. But only if those facts entitle the moving party to judgment as a matter of law should the court grant summary judgment. *See Amaker v. Foley*, 274 F.3d 677, 681 (2d Cir. 2001); *Anchorage Assoc. v. Virgin Islands Board of Tax Review*, 922 F.2d 168, 175-76 (3d Cir. 1990); *Livernois v. Medical Disposables, Inc.*, 837 F.2d 1018, 1022 (11th Cir. 1988).

Reed, 312 F.3d at 1195.

Finally, the Court notes that on August 10, 2016, it held a Show Cause Hearing at which it explained to Plaintiff that the motion was deemed unopposed because of her repeated failure to respond. (Docket No. 91).

Jurisdiction

The Court has jurisdiction pursuant to 28 U.S.C. § 1331.

Undisputed Material Facts

- Plaintiff has been diagnosed with Attention Deficit Hyperactivity Disorder and bipolar condition. (Pltf. Depo.[2] at 43:23-44:4, 60:15-25, 62:21-63.1).
- In July 2013, Plaintiff interviewed with Darlene Linan for a job as a Customer Service Representative in Defendant's Denver, Colorado office. (Linan Decl. 72-1 ¶ 7).
- "All newly hired Customer Service Representatives are required to undergo training for the position. The training class lasts approximately seven weeks."

[2] Because Docket No. 72-1 includes both the deposition transcript from Plaintiff's February 1, 2016 deposition and the Declaration of Darlene Linan, the Court will refer to each of these documents any attached exhibits as "Pltf. Depo" and "Linan Decl."

(Linan Decl. ¶ 8).

- Plaintiff's training began on July 29, 2013. (Linan Decl. ¶ 8).

- Plaintiff attended the training program from July 29, 2013 through August 16, 2013. (Linan Decl. ¶¶ 9, 12).

- Plaintiff believes that the alleged discrimination began because she corrected the training instructor's pronunciation of a restaurant's name. (Pltf. Depo. 21:11-23:15, 61:25-62:20).

- Plaintiff maintains that the training instructor "took away the pencils. Everything I needed to take notes with" from the class. (Pltf. Depo. 25:9-12, 61:25-62:13).

- There were 19 other new hires who attended the training class with Plaintiff. (Pltf. Depo. 174:3-5; Whitehead Decl. ¶ 11).

- The instructor, Leesa Whitehead, found Plaintiff disruptive to the class. (Whitehead Decl. ¶¶ 13-17).

- While Plaintiff told Ms. Whitehead that she had ADHD, Plaintiff never requested any specific accommodation. (Whitehead Decl. ¶¶ 23).

- However, Ms. Whitehead offered Plaintiff accommodations to assist her even without any request for specific accommodations. (Whitehead Decl. ¶¶ 24-26, 31).

- Ms. Whitehead stated that "[t[here was no point in time when [she] told Ms. Suarez or any other trainee that they were not allowed to take notes." (Whitehead Decl. ¶ 31).

- Ms. Whitehead also stated that she never removed any note-taking materials from any of the trainees. (Whitehead Decl. ¶ 32).

- During the 19 days that she was employed by Defendant, Plaintiff completed two required assessments. She scored 75.56% and 83.33%. (Whitehead Decl. ¶ 20; Whitehead Decl. Ex. B).

- The Full-Time New Hire Learner Guidelines and Expectations states: "In order to be considered satisfactory, learners need to achieve a score **at or above 85%** for each of the individual assessments." (Whitehead Decl. Ex. A (emphasis in original)).

- On August 16, 2013, Plaintiff resigned[3] from the Customer Service Representative position. (Pltf. Depo. 237:22; Linan Decl. ¶ 12; Ex. 4 (Docket No. 72-2 at 40)).

- At Defendant, a Customer Service Representative is expected to perform the following job functions: "the ability to effectively interact and communicate with Anthem customers; the ability to focus closely and listen to Anthem's customers; responding to and resolving customer inquires, demands and concerns; remaining professional, composed courteous and friendly when addressing all customers; maintaining accurate records of customer interactions; and providing general and specific support to Anthem's customers." (Linan Decl. ¶ 9).

- Due to her disabilities, Plaintiff breaks down crying when she does not feel supported. (Pltf. Depo. 44:5-11, 46:10-12, 101:3-15, 103:9-21).

- Due to her disabilities, Plaintiff "want[s] to go to sleep" when she does not feel supported. (Pltf. Depo. 102:16-19).

- Plaintiff defines "being supported" as someone being on "[her] side." (Pltf. Depo. 94:14-17).

- If someone talks to Plaintiff and she perceives them as not on her side, the interaction may lead to her breaking down crying. (Pltf. Depo. 94:18-22).

- If someone challenges Plaintiff in any way, she gets depressed and cries, which is "especially" true "when it comes to [her] job." (Pltf. Depo. 102:20-23, 103:9-21).

- Plaintiff is sensitive to criticism, someone raising his or her voice to Plaintiff, and to people who she perceives as being condescending to her. (Pltf. Depo. 100:16-101:2, 101:22-24, 103:6-9, 101:24-102:19).

Analysis

As Judge Moore recently summarized:

> Summary judgment is appropriate only if there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Henderson v. Inter-Chem Coal Co., Inc.*, 41 F.3d 567, 569-70

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[3] In the motion, Defendant does not address whether Plaintiff's resignation was a constructive termination. However, regardless of whether Plaintiff has shown that she was constructively terminated, Defendant is entitled to summary judgment with regard to Plaintiff's ADA claim.

(10th Cir. 1994). Whether there is a genuine dispute as to a material fact depends upon whether the evidence presents a sufficient disagreement to require submission to a jury or is so one-sided that one party must prevail as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986); *Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1136 (10th Cir. 2000). "Under Rule 56(c), the moving party[ ] always bears the initial responsibility of informing the district court of the basis for its motion...." *Reed v. Bennet*, 312 F.3d 1190, 1994 (10th Cir. 2002) (quoting *Celotex Corp.*, 477 U.S. at 322). However, the moving party "can satisfy that burden with respect to an issue on which it does not bear the burden of persuasion at trial simply by indicating to the court a lack of evidence for the nonmovant on an essential element of the nonmovant's claim." *1-800-Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229, 1242 (10th Cir. 2013) (citation omitted). Once the moving party meets its initial burden of demonstrating an absence of a genuine dispute of material fact, the burden then shifts to the non-moving party to move beyond the pleadings and to designate evidence which demonstrates the existence of a genuine dispute of material fact to be resolved at trial. *See id.* A fact is "material" if it pertains to an element of a claim or defense; a factual dispute is "genuine" if the evidence is so contradictory that if the matter went to trial, a reasonable jury could return a verdict for either party. *Anderson*, 477 U.S. at 248. In considering whether summary judgment is appropriate, the facts must be considered in a light most favorable to the non-moving party. *Cillo v. City of Greenwood Vill.*, 739 F.3d 451, 461 (10th Cir. 2013) (citations omitted).

If a movant properly supports a motion for summary judgment, the opposing party may not rest on the allegations contained in her complaint, but must respond with specific facts showing a genuine factual issue for trial. Fed. R. Civ. P. 56(e); *Scott v. Harris*, 550 U.S. 372, 380 (2007) (holding that "[t]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact") (citation omitted).

Only admissible evidence may be considered when ruling on a motion for summary judgment. *Jaramillo v. Colo. Judicial Dep't*, 427 F.3d 1303, 1314 (10th Cir. 2005) (citation omitted) (holding that hearsay evidence is not acceptable in opposing a summary judgment motion); *World of Sleep, Inc. v. La-Z-Boy Chair Co.*, 756 F.2d 1467, 1474 (10th Cir. 1985). Affidavits must be based on personal knowledge and must set forth facts that would be admissible evidence at trial. *Murray v. City of Sapulpa*, 45 F.3d 1417, 1422 (10th Cir. 1995). "[C]onclusory and self-serving affidavits are not sufficient." *Id.* (citation omitted). The Court will not consider statements of fact, or rebuttals thereto, which are not material or are not supported by

> competent evidence. Fed. R. Civ. P. 56(c)(1)(A), 56(e)(2), 56(e)(3). "[O]n a motion for summary judgment, it is the responding party's burden to ensure that the factual dispute is portrayed with particularity, without depending on the trial court to conduct its own search of the record." *Cross v. The Home Depot*, 390 F.3d 1283, 1290 (10th Cir. 2004) (internal quotation, alterations and citation omitted).

Crist v. Dorr to Door Pizza, LLC, No. 13-cv-02550-RM-MJW, 2015 WL 4574949, at *1-2 (D. Colo. July 30, 2015).

In her Amended Complaint, Plaintiff alleges that she was not allowed to take notes while in the training class (Docket No. 27 at 3). She alleges that this was a violation of the Americans with Disabilities Act ("ADA") because she has ADHD. Plaintiff also alleges that she was made fun of, but does not relate that allegation to any disability.[4] Nevertheless, the Court addresses the harassment claim in addition to the failure to accommodate claim below. As a result of these claims, Plaintiff seeks a variety of things that the Court cannot award such as "[t]he pain of having to sell my puppy," the writing of letters of apology to certain family members, and "[e]mbarrassment," in addition to monetary damages. (*Id.* at 7).

The ADA prohibits employment discrimination "against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). To qualify for relief under the ADA, Plaintiff must establish that she (1) is disabled within the meaning of the

[4] Plaintiff also testified at her deposition that she does not believe she was discriminated against because of her disability and is not pursuing any claim for alleged discrimination. Pltf. Depo 218:8-219:23. Instead, she is pursuing a claim for failure to accommodate and a claim of harassment. (*Id.*)

ADA; (2) is qualified, with or without reasonable accommodation, to perform the essential functions of the job; and (3) was discriminated against because of her disability. *White v. York Intern. Corp.*, 45 F.3d 357, 360-61 (10th Cir. 1995). Discrimination under the ADA can include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual." *Davidson v. America Online, Inc.*, 337 F.3d 1179, 1188-89 (10th Cir.2003); 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9.

The ADA defines 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 such individual holds or desires." 42 U.S.C. § 12111(8). Courts in the Tenth Circuit use a two-step inquiry to determine whether a plaintiff is qualified, with or without reasonable accommodation, to perform the essential functions of the job held or desired: "(1) whether the plaintiff's impairment prevented [her] from performing the essential functions of [her] job, and (2) if so, whether [she] might have nevertheless been able to perform those functions if the employer provided [her] a reasonable accommodation." *Hawkins v. Schwan's Home Serv., Inc.*, 778 F.3d 877, 884 (10th Cir. 2015) (internal alterations and quotations omitted). Throughout this inquiry, the plaintiff bears the burden of showing she can perform the essential functions of her job. *Mason v. Avaya Comm. Inc.*, 357 F.3d 1114, 1119 (10th Cir. 2004) (citing US Airways, Inc. v. Barnett, 535 U.S. 391, 400 (2002)). Under the ADA "consideration shall be given to the employer's judgment as to what functions of a job are essential," and an employer's written job description "shall be considered evidence of the essential functions of the job." 42 U.S.C. § 12111(8). Further, the statute contemplates a broad array of "reasonable accommodations" that may include, *inter alia*, "job restructuring, . . . modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, . . . or policies, . . . and other similar accommodations." *Id.* § 12111(9)(B). Once the employer provides evidence of what is "essential" in a job, the plaintiff must provide sufficient evidence to rebut that conclusion. *Milton v. Scrivner*, Inc., 53 F.3d 1118, 1124 (10th Cir. 1995). A plaintiff's self-serving testimony about the essential functions of a position is insufficient to create a "genuine" issue of material fact. *Mason*, 357 F.3d at 1121-22. Further, an employer is not required "to create a position out of wholecloth to accommodate the individual in question." *Hawkins*, 778 F.3d at 884 (citations omitted).

Defendant argues that "the nature and manifestations of Plaintiff's disabilities establish that she was unqualified for the Customer Service Representative position, with or without any accommodation." (Docket No. 70 at 6). As noted above, Plaintiff did not complete the training program required prior to beginning the Customer Service Representative position for which she was hired. Further, she did not pass the two assessments that she took before resigning. In addition, the Customer Service Representative position for which Plaintiff was hired required Plaintiff to interact with a variety of individuals on behalf of Defendant. This included "responding to and resolving customer inquires, demands and concerns; remaining professional, composed courteous and friendly when addressing all customers; maintaining accurate records of customer interactions; and providing general and specific support to Anthem's customers." (Linan Decl. ¶ 9). Plaintiff offers no evidence to refute the essential job functions described above.

Looking at the evidence presented regarding the essential job functions and Plaintiff's own testimony about the manifestation of her disabilities, the Court concludes that Plaintiff cannot show that she is qualified, with or without reasonable accommodation, to perform the essential functions of the job as required under the ADA. First, Plaintiff did not pass the required assessments. Second, Plaintiff's testimony makes clear that the she would not be able to perform as a Customer Service Representative regardless of whether Defendant offered accommodations. As Plaintiff's testimony makes clear, if faced with a customer who Plaintiff viewed as not supporting her, Plaintiff might break down crying, go to sleep, or become depressed. Further, as Plaintiff testified, if a customer criticized her or raised his or her voice, Plaintiff may breakdown crying in response. Finally, if Plaintiff felt that a customer was condescending to her, Plaintiff may also break down crying

Plaintiff "must establish that [s]he could have satisfied the requirements of h[er] job with a reasonable accommodation, but that the employer failed to provide one upon request." *Higgins v. Maryland Dept. of Agriculture*, No. L-11-0081, 2012 WL 665985 at *6 (D. Maryland Feb. 28, 2012); *see Darcangelo v. Verizon Maryland, Inc.*, 189 Fed. App'x. 217, 218-19 (4th Cir.2006) (concluding that an employee who suffered from bipolar disorder was not "otherwise qualified" because her "aggressive and antagonistic behavior thus demonstrated her complete inability to interact with others in a courteous manner, as required by her position and Verizon's Code of Business Conduct"). Plaintiff fails to offer any evidence that she could have satisfied the requirements of the Customer Service Representative position with or without accommodations.

With regard to Plaintiff's allegation that she was harassed, it is clear that Plaintiff does not link this alleged harassment to her disabilities.

> For a hostile environment claim to survive summary judgment, [plaintiff] was required to present evidence from which a rational jury could find that her workplace was permeated with discriminatory intimidation, ridicule, and insult that was sufficiently severe or pervasive to alter the terms, conditions, or privileges of employment, and the harassment stemmed from disability-related animus.

Schlecht v. Lockheed Martin Corp., 626 F. App'x. 775, 778 (10th Cir. 2015) (citation omitted). Here, Plaintiff's harassment claim is based on the fact that she believes Ms. Whitehead was upset that Plaintiff corrected her pronunciation of the name of a restaurant. (Pltf. Depo. 21:11-23:15, 61:25-62:20). Accordingly, Plaintiff fails to show that the alleged harassment "stemmed from disability-related animus." *Schlecht*, 626 F. App'x. at 778.

Recommendation

Based upon the foregoing, it is hereby

RECOMMENDED that Defendant's Motion for Summary Judgment (Docket No. 70) be **GRANTED** and that judgment enter in Defendant's favor and against Plaintiff.

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b)(2), the parties have fourteen (14) days after service of this recommendation to serve and file specific written objections to the above recommendation with the District Judge assigned to the case. A party may respond to another party's objections within fourteen (14) days after being served with a copy. The District Judge need not consider frivolous, conclusive, or general objections. A party's failure to file and serve such written, specific objections waives de novo review of the recommendation by the District Judge, *Thomas v. Arn*, 474 U.S. 140, 148-53

(1985), and also waives appellate review of both factual and legal questions. *Makin v. Colo. Dep't of Corr.*, 183 F.3d 1205, 1210 (10th Cir. 1999); *Talley v. Hesse*, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated: August 23, 2016
Denver, Colorado

s/ Michael J. Watanabe
Michael J. Watanabe
United States Magistrate Judge

FILED
United States Court of Appeals
Tenth Circuit

October 12, 2017

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JEANNETTE A. SUAREZ,

Plaintiff - Appellant,

v.

ANTHEM, INC., f/k/a WellPoint,

Defendant - Appellee.

No. 17-1073

ORDER

Before **KELLY**, **MURPHY**, and **MATHESON**, Circuit Judges.

Appellant's petition for panel rehearing is denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

Additional material from this filing is available in the Clerk's Office.