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DISTRICT OF UTAH

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH  
NORTHERN DIVISION

BY: \_\_\_\_\_  
DEPUTY CLERK

CAROL DUNCAN,

Plaintiff,

vs.

CONVERGYS CORPORATION,

Defendant.

MEMORANDUM DECISION AND  
ORDER

Case No. 1:03CV35DAK

This matter is before the court on Defendant Convergys Corporation's Motion for Summary Judgment. The court scheduled a hearing on the motion for September 28, 2004. Defendant was represented by Gary A. Dodge. Plaintiff's counsel did not appear. The court did not take arguments on the motion. Rather, the court stated that it would take the motion under advisement and rule based upon the parties' briefing. The court has carefully considered all pleadings, memoranda, and other materials submitted by the parties. The court has further considered the law and facts relevant to Defendant's motion. Now being fully advised, the court enters the following Memorandum Decision and Order.

**BACKGROUND**

In this case, Plaintiff sued her former employer Convergys for an alleged violation of the Americans with Disabilities Act ("ADA") in relation to her termination of employment. Plaintiff has been diagnosed and treated for chronic depression and anxiety since she was sixteen years

old. Plaintiff claims that her depression and anxiety substantially limit her ability to interact with others in a group setting and that Convergys failed to accommodate her alleged disability.

Duncan began her employment at Convergys' Ogden call center facility on July 5, 2000, as a Benefits Coordinator in the Human Resources Department. In December 2000, Duncan was made a Benefits Manager. In March 2002, Convergys eliminated the Benefits Coordinator and Manager positions as a part of corporate restructuring and assigned Duncan to the Senior Human Resources Associate position.

On a number of occasions during Duncan's employment with Convergys, she was disciplined for inappropriate and unprofessional conduct, including: (1) having an oppressive management style; (2) being abrasive and harsh in her approach to subordinates; (3) making derogatory remarks and slang sayings; (4) telling off-colored jokes; (5) creating a hostile work environment for her co-workers and subordinates by lashing out at them and making derogatory comments about their appearance and health; (6) making crass and vulgar comments to customers; and (7) engaging in sexually harassing conduct towards a co-worker. In certain personnel records, Duncan admits that she said "pretty stupid things" and that she used "colorful metaphors."

In July 2002, Convergys terminated Duncan. Its stated reason for the termination was that she had misrepresented herself as an agent of Convergys when she interjected herself on behalf of a personal friend who was being harassed at another workplace. After investigating the situation, Convergys terminated Duncan because her behavior, notwithstanding extensive counseling and discipline, was inappropriate, unacceptable, and in violation of Convergys' Code of Business Conduct.

Duncan asserts that in December 2000, when she was made a Benefits Manager, she informed her supervisor that she lacked the training and experience to occupy the position, that she was vulnerable to severe and socially debilitating anxiety and depression when she was required to interact with groups of people and that she was dependent upon the drug Zoloft to maintain her workplace presence.

Duncan made passing references to her disability on two other occasions. In January 2002, Duncan stated that she had an anxiety disorder in response to discipline she received for creating a hostile work environment, and in response to her May 8, 2002 final warning, Duncan stated that she had "autism/aspergers syndrome." After she mentioned "autism/aspergers syndrome," the Human Resources Manager, Lana Smith, sent Duncan a letter requesting Duncan to provide Convergys with medical documentation of her condition. The letter further stated that upon receipt of the medical documentation, the company would consider the extent to which it could meet her medical needs and work restrictions imposed by the physician. Duncan did not respond to this letter or provide Convergys with any medical documentation with respect to any alleged disability. Throughout her time of employment with Convergys, Duncan never provided any medical documentation of any disability.

The medical evidence Duncan has provided in support of her claim for a disability consists of two letters. One letter from Dr. Dennis E. Ahren, a psychologist, who states that he diagnosed Duncan with "Dysthymic Disorder, a long term depressiveness" on May 16, 2002. The letter states that he counseled Duncan on four occasions—two before her termination, and two after her termination. Dr. Ahern's letter states that after her diagnosis at her first evaluation on May 16, 2002, "it was agreed that we would work on issues of social sensitivity and also

clarify the possibility of an anxiety disorder.” He also concluded his letter stating, “In all, she appeared to work openly and effectively and seemed to be making progress when her employment was terminated. No contact with her employer was sought or made during the time that her treatment and employment overlapped.”

The second letter is from Duncan’s treating physician, Dr. Nelson Astle, a family practitioner. Dr. Astle’s letter, dated November 6, 2002, states that Duncan “has been successfully treated for chronic depression.” However, it notes that she had a severe exacerbation of her symptoms in July of 2002 due to “acute withdrawal of her medication.” Dr. Astle had not had an opportunity to follow-up with Duncan since that time, but stated that “[e]xacerbation of her chronic, but usually well controlled, depression would include poor social skills, anger, isolation, insomnia, and poor work habits.” It is unclear from Dr. Astle’s letter whether the withdrawal of medication occurred before or after Duncan’s termination of employment on July 5, 2002.

## **DISCUSSION**

Convergys argues that it is entitled to summary judgment because Duncan cannot establish a disability, that Convergys failed to accommodate her alleged disability, or that the termination of her employment was a result of her alleged disability. To establish a prima facie case of disability under the ADA, a plaintiff must demonstrate that: (1) she is disabled within the meaning of the ADA; (2) she is a qualified individual with or without accommodation to perform the essential functions of her job; and (3) she was terminated because of her disability. *Frazier v. Simmons*, 254 F.3d 1247, 1256 (10<sup>th</sup> Cir. 2001).

## A. Disability

Convergys argues that Duncan cannot meet her burden to demonstrate that she is disabled under the ADA. For purposes of the ADA, a disability is defined as “a physical or mental impairment that substantially limits one or more of the major life activities of such individual.” 42 U.S.C. § 12102(2). The question of whether a plaintiff is disabled under the ADA, and therefore, can bring a claim under the statute, “is a question of law for the court, not a question of fact for the jury.” *Poindexter v. Atchison, Topeka & Santa Fe Rwy.*, 168 F.3d 1228, 1230 (10<sup>th</sup> Cir. 1999).

When considering whether a person is disabled under the ADA, a court must conduct a three-step inquiry: “(1) determining whether the individual has an impairment; (2) identifying the activities the individual alleges to be affected by the impairment and determining whether they constitute ‘major life activities’ under the ADA; and (3) determining whether the impairment substantially limits the major life activity.” *Doyal v. Oklahoma Heart Inc.*, 213 F.3d 492, 495 (10<sup>th</sup> Cir. 2000).

Convergys argues that Duncan has not produced sufficient medical evidence demonstrating that she has an impairment and that such impairment substantially limits any major life activity. A person alleging a disability protected by the ADA “has the burden of establishing with medical evidence the existence of the alleged disability.” *Kalekirstos v. CTF Hotel Mgt Corp.*, 958 F. Supp. 641, 657 (D.D.C. 1997). Duncan made only passing comments regarding purported disabilities—on one occasion she stated she had an anxiety disorder and on one occasion she stated she had autism/aspergers syndrome. However, she never submitted medical documentation to Convergys, even when requested to do so. Even the medical evidence

that Duncan submitted in connection with her claim does not demonstrate that she has ever been diagnosed with anxiety disorder or autism/aspergers syndrome. Although Duncan cites to cases stating that medical evidence is not always necessary to establish an impairment, there are several cases finding that medical evidence of the alleged disability is required. *Kalekirstos v. CTF Hotel Management Corp.*, 958 F. Supp. 641, 657 (D.D.C. 1997) (plaintiff “has a burden of establishing with medical evidence the existence of the alleged disability”); *Farley v. Gibson Container Inc.*, 891 F. Supp. 322, 326 (N.D. Miss. 1995) (“Employers should not be expected to recognize a physical impairment solely on an employee’s ‘say-so’ . . . . The logical consequences of such blind acceptance are simply too obvious to state.”); *Susle v. Sirina Protection Sys. Corp.*, 269 F. Supp. 2d 285, 301 (S.D.N.Y. 2003) (“[A] plaintiff’s personal testimony which describes the alleged limits that affect a major life activity, without supporting medical testimony, simply is not sufficient to establish a prima facie case under the ADA.”).

Duncan argues that there is sufficient evidence within the existing court record to establish that her medical doctor diagnosed and treated her for chronic depression. Convergys acknowledges that depression has been recognized by some courts as an impairment potentially covered by the ADA. However, merely having an impairment does not make one disabled under the ADA. It is a three-part inquiry. Therefore, even if Duncan relies on her diagnosis of depression, Convergys contends she cannot meet the other requirements of demonstrating a disability, such as demonstrating that her alleged impairment substantially affects a major life activity.

Duncan argues that she has been diagnosed and treated for chronic depression since she was sixteen years old and prescription medication mitigates the consequences of the impairment.

Notwithstanding her continuing use of prescription medications, she contends that she is subject to severe and debilitating depression and anxiety when she is compelled to interact with groups. Therefore, she argues that her depression, even with medication, is an ADA impairment for which she is substantially limited in the major life activities of sleep, speech, and interaction with others.

“Major life activity” has been construed to mean a “basic activity that the average person in the general population can perform with little or no difficulty.” *Pack v. Kmart Corp.*, 166 F.3d 1300, 1305 (10<sup>th</sup> Cir. 1999). Major life activities include such functions as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, sleeping, sitting, standing, lifting, reaching, and working. *See Poindexter*, 168 F.3d at 1231-32. In determining whether a particular activity is a “major life activity” a court considers whether the activity is significant within the meaning of the ADA, rather than whether that activity is important to the particular individual.

There are cases recognizing that depression and other psychological impairments may limit one’s ability to interact with others. In *McAlindin v. County of San Diego*, 192 F.3d 1226, 1234-35 (9<sup>th</sup> Cir. 1999), the court recognized that interacting with others is a major life activity where the plaintiff suffered from anxiety, panic, and somatoform disorders that were expressed, in part, by a pattern of withdrawal from public places and family members.

However, the Tenth Circuit has not found that the inability to socially interact in general constitutes a major life activity. In *Steele v. Thiokol*, 241 F.3d 1248, 1253 (10<sup>th</sup> Cir. 2001), the court focused on the third prong of the disability test—whether the alleged impairment substantially limits major life activities. The court stated that in order to demonstrate a

substantial limitation on interacting with others, “a plaintiff must show that [her] relations with others were characterized on a regular basis by severe problems, for example, consistent high levels of hostility, social withdrawal or failure to communicate when necessary.” *Id.* at 1253. The *Steele* court found it dispositive that the plaintiff had failed to “provide any evidence that [her] impairment has caused [her] to have trouble getting along with people in general.” *Id.*

In *Doyal v. Oklahoma Heart Inc.*, 213 F.3d 492, 495 (10<sup>th</sup> Cir. 2000), the Tenth Circuit held that in order for an impairment to be substantially limiting, the individual must be unable to perform a major life activity that the average person in the general population can perform or significantly restricted in the manner or duration of performing the activity in comparison to the average person. *Doyal*, 213 F.3d at 496. In *Bolton v. Scrivner, Inc.*, 36 F.3d 939 (10<sup>th</sup> Cir. 1994), the Tenth Circuit provided the factors to be considered when determining whether an impairment “substantially limits” a major life activity as follows: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long term impact, or the expected permanent or long term impact, resulting from the impairment. *Id.* at 942.

Plaintiff acknowledges that the United States Supreme Court held in *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 482-83 (1999), that the determination of whether a person is substantially limited in a major life activity must take into account measures which the plaintiff uses to correct or mitigate an impairment. Therefore, plaintiff recognizes that a person whose impairment is corrected by medication or other measures does not have an impairment that presently “substantially limits a major life activity.” *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720, 724 (8<sup>th</sup> Cir. 2002). A court in the District of Kansas has stated that “the corrective effects of

medication must be taken into account in the ‘substantially limited’ analysis.” *Sherer v. GE Capital Corp.*, 59 F. Supp. 2d 1132, 1136 (D. Kan. 1999).

In this case, Plaintiff has not demonstrated that she has severe problems interacting with people in general. The medical evidence submitted by Duncan establishes that she is “usually well controlled.” Plaintiff also submitted several items, such as cards and letter, from her employment demonstrating a collegial relationship with co-workers. Therefore, there is no evidence that there were severe problems on a consistent basis.

Furthermore, there is no medical evidence in this case that Duncan’s depression caused ongoing poor social interaction skills. In fact, the letter from her family practitioner commented that she only exhibited poor social skills when she had an acute withdrawal of medication and that he expected it to subside with her placement on new medication. Therefore, the evidence actually shows that Duncan suffered only from a temporary set back sometime in July 2002 while there was a acute withdrawal of medication. However, this withdrawal occurred in July 2002 at the time she was terminated. It does not relate to all of the disciplinary problems she experienced during the term of her employment with Convergys. In fact, it is not known from the doctor’s letter whether the acute withdrawal even occurred before her termination because the letter only states July 2002, and Duncan was terminated July 5, 2002. Therefore, Duncan’s arguments are not supported by the evidence in this case.

In addition, Duncan has provided no comparison demonstrating that her skills and abilities are inferior to those of the average person. When considering that her claimed major life activity is interacting with groups of people, there are many average people in the general population that share her problem. There is no evidence that, while properly taking her

medications, that Duncan is comparatively inferior in interacting with groups of people to a person in the general populace. Therefore, the court concludes that Plaintiff has not demonstrated “a physical or mental impairment that substantially limits one or more of the major life activities of such individual.” *See* 42 U.S.C. § 12102(2).

### **B. Reasonable Accommodation**

Even if Duncan had demonstrated that she is disabled under the terms of the ADA, Convergys asserts that her claim also fails because there is no evidence that Convergys learned of the disability in a time or a manner sufficient to trigger a duty to accommodate her disability. The duty of an employer to reasonably accommodate an employee’s disability does not arise until the employee gives the employer proper notice of her disability. A plaintiff bears “the initial burden of initiating an interactive process” with the employer. *Wells v. Shalala*, 228 F.3d 1137, 1145 (10<sup>th</sup> Cir. 2000). An employee must “initiate an interactive process with the employer by providing notice of [her] disability and any resulting limitations and expressing a desire for reassignment.” *Hall v. Claussen*, 6 Fed. Appx. 655, \*5 (10<sup>th</sup> Cir. 2001).

Duncan contends that requests for reasonable accommodation do not need to be reduced to writing and the request does not need to identify the ADA or incorporate the phrase accommodation. *See Taylor v. Phoenixville School District*, 184 F.3d 296, 313-14 (3d Cir. 1999), *Fjellestad v. Pizza Hut of America, Inc.*, 188 F.3d 944, 952 (8<sup>th</sup> Cir. 1999). Duncan claims that her affidavit establishes that she informed her supervisor that she “lacked the mental/emotional durability and stamina to occupy a management level position and/or to occupy any position which placed her in the worker population and otherwise required her to interact with groups of people.” She contends that Convergys refused to engage in the

interactive process to consider the availability of a reasonable accommodation.

The evidence in this case demonstrates that some of the instances to which Duncan refers are so vague that no reasonable employer could have known that someone was attempting to state that she had a disability in need of an accommodation. After one problematic situation, Duncan wrote a letter to her supervisor commenting that she was always nervous when she spoke in front of a room full of people, that she is not 100 per cent when she is feeling overwhelmed, and that she attributed some of her statements and comments to anxiety and fear. Although the statement speaks of nervousness and anxiety, none of these statements specifically identify a disability nor do they indicate that she was suffering from chronic depression. The statements do not provide a basis for requiring Convergys to respond with a request for reasonable accommodation. Duncan needed to provide more specific comments in order to give some kind of indication that she believed a disability was affecting her performance and that a reasonable accommodation was necessary.

In addition, although Duncan claims that she provided notice of her disability to Convergys and requested a reasonable accommodation in December 2000 when she became a Benefits Manager and in March 2002 when she was transferred to the Senior Human Resources Associate, those claims are not supported by the evidence. Duncan represented on her application with Convergys that she was not disabled. Also, Duncan's year-end appraisal for 2000 expressed appreciation that she had been assigned the responsibilities of the Benefits Manager position. This contradicts her assertion she had requested a transfer. Also, Duncan's claim that she gave notice of her disability and requested that Convergys reassign her to the Benefits Coordinator job at the time she was transferred to the Senior HR Associate position is

belied by the fact that the Benefits Coordinator position had already been eliminated from Convergys' Ogden Call Center.

The Tenth Circuit has repeatedly held that an “employer can still prevail on summary judgment if the employee failed to ‘show that a reasonable accommodation was possible and would have led to a reasonable position.’” *Frazier v. Simmons*, 254 F.3d 1247, 1261 (10<sup>th</sup> Cir. 2001). To survive summary judgment, Plaintiff “must establish that [s]he was qualified to perform an appropriate vacant job which [s]he must specifically identify and show was available within the company at or about the time [s]he requested reassignment.” *Taylor v. Pepsi-Cola Co.*, 196 F.3d 1106, 1110 (10<sup>th</sup> Cir. 1999).

Duncan has not demonstrated that there was another appropriate job vacant that was available at the time she asked to become a Benefits Coordinator rather than a Senior HR Associate. In addition, Convergys has demonstrated that the types of interpersonal skills required to perform the functions of a Senior HR Associate adequately are nearly identical to those required for the Benefits Coordinator position. Therefore, even if the position had still existed, there is no indication that it would have been a more appropriate job for Duncan.

In May 2002, when Duncan stated a specific disability, Convergys responded by asking her to submit documentation. However, Duncan never provided any documentation after receiving this request from Convergys. Duncan's claim that Convergys did not work in good faith with her on a reasonable accommodation appears disingenuous given her lack of notice and failure to provide any documentation. Therefore, Duncan has not demonstrated that Convergys failed to engage in an interactive process to reach a reasonable accommodation of her alleged disability.

### **C. Termination Based on Disability**

Convergys claims that no medical condition from which Duncan allegedly suffered played a role in its decision to terminate her employment. Convergys argues that the undisputed evidence shows that Convergys' decision to terminate Duncan's employment was based on her repeated unprofessional conduct. Duncan, however, alleges that her depression and anxiety disorder is what caused her unacceptable behavior and, therefore, was the reason for her termination. Duncan argues that the July 5, 2002 employment termination letter references previous warning memoranda received by Duncan that expressed on-going dissatisfaction with Duncan's social and interpersonal skills. These stated dissatisfactions, Duncan contends, all originate from Convergys' decision to place Duncan in a supervisory position and then another position that required her to interact with the worker population.

Duncan has not produced evidence sufficient to create a material dispute in support of her claim that Convergys' determination to terminate her employment was based on its animus toward her alleged disability. Although she claims that all of her disciplinary problems are a result of her depression, Plaintiff has not provided a link between her alleged depression and her disciplinary problems. Duncan has not produced evidence that her alleged disability excuses her inappropriate conduct, such as sexual harassment and representing herself on a personal matter as an agent of Convergys. Therefore, there is no basis for this court to determine that Duncan's termination was based on an animus toward her depression.

Moreover, even if Duncan had established a prima facie case, there is no evidence that Convergys' decision to terminate her after several disciplinary problems and an incident in which she improperly identified herself on a personal matter as an agent for Convergys is

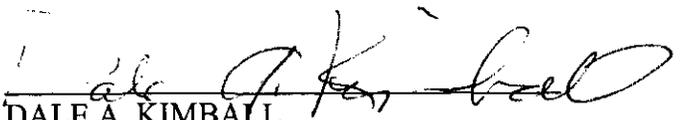
pretextual. Therefore, Defendant is entitled to summary judgment.

**CONCLUSION**

Based on the above reasoning, Defendants' Motion for Summary Judgment is GRANTED. This case is dismissed with prejudice, each party to bear its and her own costs.

DATED this 13<sup>th</sup> day of October, 2004.

BY THE COURT

  
DALE A. KIMBALL  
United States District Judge

United States District Court  
for the  
District of Utah  
October 14, 2004

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 1:03-cv-00035

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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