

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ALFRED G. SEWELL, Pro Se,)
)
 Plaintiff,)
)
 v.) C.A. No. 01-208
)
 TRIAD CONSTRUCTION,)
)
 Defendant.)

MEMORANDUM AND ORDER

I. INTRODUCTION

On April 2, 2001, Alfred G. Sewell (“Sewell”) filed this *pro se* employment discrimination action pursuant to the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* (“ADA”).¹ In his complaint, Sewell alleges that his former employer, Triad Construction (“Triad”), discriminated against him because of his hearing impairment.

_____ Presently before the court is Triad’s motion to dismiss. Because Triad has included material outside the pleadings, the court will construe the motion as one for summary judgment. *See* FED. R. CIV. P. 12(b). For the following reasons, the court will grant the motion.

II. STANDARD OF REVIEW

This court may grant summary judgment only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). An issue is “genuine” if, given the evidence, a reasonable jury could return a verdict in favor of the non-moving party. *See, e.g., Abraham v. Raso*, 183 F.3d 279, 287 (3d Cir. 1999) (citing *Anderson v. Liberty*

¹Sewell’s complaint states that his case is based on Title VII violations, but after reading the allegations, it is clear that Sewell is actually alleging an ADA claim.

Lobby, Inc., 477 U.S. 242, 248-51 (1986)); *Lloyd v. Jefferson*, 53 F. Supp. 2d 643, 654 (D. Del. 1999) (citing same). A fact is “material” if it bears on an essential element of the plaintiff’s claim. *See, e.g., Abraham*, 183 F.3d at 287; *Lloyd*, 53 F. Supp. 2d at 654. On summary judgment, the court cannot weigh the evidence or make credibility determinations. *See Anderson*, 477 U.S. at 255 (“Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict.”); *International Union, United Auto., Aerospace & Ag. Implement Workers of America, U.A.W. v. Skinner Engine Co.*, 188 F.3d 130, 137 (3d Cir. 1999) (“At the summary judgment stage, a court may not weigh the evidence or make credibility determinations; these tasks are left to the fact finder.”). Instead, the court can only determine whether there is a genuine issue for trial. *See Abraham*, 183 F.3d at 287. In doing so, the court must look at the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences and resolving all reasonable doubts in favor of that party. *See, e.g., Pacitti v. Macy’s*, 193 F.3d 766, 772 (3d Cir. 1999). With this standard in mind, the court will now briefly describe the facts leading to the motion presently before the court.

III. BACKGROUND

As Sewell has failed to provide the court with factual information regarding his claims, the circumstances surrounding this case are somewhat unclear.² However, based on the Delaware Department of Labor’s evaluation of Sewell’s claims, the court can discern that the following events

²The court notes that Triad has attempted to engage in discovery with Sewell, but that he was unresponsive to their requests. Instead, Sewell informed Triad that he would not respond to discovery requests absent the advice of counsel.

allegedly occurred.

Sewell began working for Triad as a temporary employee around December 21, 1999. He ended his employment with Triad on or about December 30, 1999. Sewell alleges that Triad terminated him because of his hearing loss, for which he wore corrective hearing aids.

_____ Triad, however, denies having had knowledge of Sewell's hearing loss. Rather, it maintains that he was terminated because of his poor job performance. Specifically, Triad alleges that Sewell was incompetent, had a "lackadaisical attitude," and was not qualified to perform his job duties.

On April 2, 2001, Sewell filed the present action. By letter dated October 30, 2002, Sewell informed the court that he was in the process of obtaining counsel. On November 9, 2001, he requested that the court provide him with a list of legal organizations. The court did so on November 9, 2001.

On February 15, 2002, Triad filed its motion to dismiss. Although Sewell's answer brief was due on March 1, 2002, he failed to adhere to this deadline. Consequently, on March 8, 2002, the court ordered either Sewell, or his counsel, to file an answer brief within thirty days of the date of the order. In that order, the court also informed Sewell that failure to comply with the order would result in the motion being decided on the record before the court. Although Sewell asked the court not to dismiss his case on April 15, 2002, he has not filed his answer brief. Accordingly, the court will decide this motion without the benefit of Sewell's answer brief.

IV. DISCUSSION

The ADA prohibits discrimination in the hiring, advancement, or discharge of an otherwise qualified employee because of such individual's disability. *See* 42 U.S.C. § 12112(a). The *McDonnell Douglas* Title VII burden shifting rules apply to claims of discriminatory treatment under

the ADA. *See Lawrence v. National Westminster Bank*, 98 F.3d 61, 68 (3d Cir. 1996). To establish a *prima facie* case under the ADA, the plaintiff must establish that he (1) has a “disability”; (2) is a “qualified individual,” and (3) has suffered an “adverse employment decision” as a result of his disability. *See Skerski v. Time Warner Cable Co.*, 257 F.3d 273, 278 (3d Cir. 2001).

In the present case, the court finds that Sewell has met only the third prong of his *prima facie* test. There is no dispute that he was terminated. He thus suffered an adverse employment decision in satisfaction of the third prong.

With regard to the first prong, Triad argues that, in this case, Sewell’s hearing loss cannot be considered a disability. Although the court is aware of no Third Circuit case law specifically addressing this issue, it is clear that, in other Circuits, a hearing loss may be considered a “disability.” *See e.g., Perkins v. St. Louis Cty. Water Co.*, 160 F.3d 449, 449 (8th Cir. 1998) (noting that a hearing impairment, depending on its severity, can be a disability under the ADA); *Ivy v. Jones*, 192 F.3d 514, 516 (5th Cir. 1999). In this case, the only indicia of the degree of Sewell’s hearing loss is a statement he apparently made to the Delaware Department of Labor. In that statement, as memorialized in the Department of Labor’s investigation report, he indicated that his condition did not affect his ability to perform his temporary-status job as a laborer. However, this subjective statement, by itself, is not sufficient evidence by which either the court, or a reasonable factfinder, could determine that Sewell meets the ADA’s “disability” requirements.³

Moreover, with regard to the second prong, Sewell’s case again suffers from a lack of any

³Specifically, for Sewell to be “disabled” under the ADA, his impairment must substantially limit his major life activity of hearing. Because Sewell stated that he wore hearing aids, the severity of his hearing loss must be examined as corrected by the hearing aids. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

evidence. Under the ADA, a “qualified individual” is one “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). To satisfy this requirement, the plaintiff must first demonstrate that he “satisfies the requisite skill, experience, education and other job-related requirements of the employment position that such individual holds or desires.” *Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 142 (3d Cir. 1998). Second, the plaintiff must establish that he, “with or without reasonable accommodation, can perform the essential functions of the position held or sought.” *Id.*

In the present case, Sewell has failed to adduce any evidence regarding the skill, experience, education, or other job-related requirements for the job in question, let alone whether he meets such requirements. Moreover, he has pointed to no evidence suggesting that, with or without a reasonable accommodation, he could perform the essential functions of that job. As a matter of law, then, the court must conclude that he has failed to meet his *prima facie* burden.

Even were the court to conclude that Sewell had met his initial burden, the burden of production would then shift to Triad to articulate a legitimate, non-discriminatory reason for Sewell’s termination. *See Walton v. Mental Health Assoc.*, 168 F.3d. 661, 668 (3d Cir. 1999). Triad has alleged that Sewell was discharged solely because he was incompetent in performing his job. This is sufficient to relieve Triad of its burden of production.

As Triad has stated a legitimate, non-discriminatory reason for its actions, Sewell must then “point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer’s articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the

employer's action." *Id.* (citing *Lawrence*, 98 F.3d at 66). As above, Sewell has failed to adduce even a scintilla of evidence on this point. In light of this lack of evidence, the court must grant summary judgment.

V. CONCLUSION

For these reasons, IT IS HEREBY ORDERED that:

1. Triad's motion for summary judgment (D.I. 17) is GRANTED.
2. Judgment BE AND IS HEREBY ENTERED in favor of Triad.
3. Triad's motion to compel discovery (D.I. 16) is declared MOOT.

Date: May 22, 2002

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE