

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LILY SPENCER,)
)
 Plaintiff,)
)
 v.) Civil Action No. 03-104-KAJ
)
 WAL-MART STORES, INC.,)
)
 Defendant.)

MEMORANDUM ORDER

INTRODUCTION

The plaintiff, Lily Spencer, a former employee of the defendant, Wal-Mart Stores, Inc. (“Wal-Mart”), alleges that Wal-Mart violated her rights under the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 et seq. (“ADA”). Before me is Wal-Mart’s motion for summary judgment (Docket Item [“D.I.”] 34; the “Motion”), asserting that the plaintiff “cannot establish that Wal-Mart failed to reasonably accommodate her disability or subjected her to a hostile work environment in violation of the ADA.” (D.I. 35 at 4.) As is more fully described herein, I am denying the Motion because material facts remain in dispute.

BACKGROUND¹

Due to complications following ear surgery when she was three years old, the plaintiff is totally deaf in both ears. (D.I. 1 at ¶ 11.) Nevertheless, she is raising three

¹Since I am obligated to view the facts pertinent to this Motion in the light most favorable to the non-moving party, see *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), the following rendition of background information is based largely upon the allegations in the Complaint (D.I. 1), as supported by affidavits and deposition testimony submitted by the plaintiff (see D.I. 38 at Exs A-D), and does not represent findings of fact.

children with her husband and, until recently, was gainfully employed by Wal-Mart. (See D.I. 38 at 7 & Ex. D pg 9.) Wal-Mart hired her in July of 1999 to work as a test scanner in its store in New Castle, Delaware. (D.I. 1 at ¶ 13.) During her tenure as an employee, she was given positive employment evaluations and wage increases and, on at least three occasions, she received commendations for her work. (See *id.* at ¶¶ 15-18, 29.) Eventually she was promoted to the position of Department Manager for the Stationery Department at the store. (*Id.* at ¶ 27.)

During her employment at the New Castle store, the plaintiff had several unpleasant encounters with the store manager, Mr. Tran (see *id.* at ¶¶ 20-25; D.I. 38 at Ex. A. ¶¶ 20-34; Ex. B at ¶ 27; Ex. C at ¶¶ 19-22), and with other employees at the store (D.I. 1 at ¶ 34; D.I. 38 at Ex. A. ¶¶ 12-19; Ex. B. ¶¶ 11-20; Ex. C ¶ 23). These encounters, she says, amounted to harassment and a hostile working environment. (See D.I. 1 at ¶¶ 34, 42.) Among these were occasions when Mr. Tran refused to provide intelligible interpreting services for the plaintiff which she felt were necessary for her to competently carry out her job responsibilities (see D.I. 1 at ¶¶ 32-33; D.I. 38 at Ex. C ¶¶ 19-22), an occasion on which Mr. Tran told the plaintiff that she couldn't be promoted because she was deaf and that she should go to school and learn English, a language which he knew she already understood (see D.I. 38 at Ex. C ¶ 22), occasions on which employees made an obscene gesture at her (*id.* at ¶ 23; D.I. 38 at Ex. D pgs 97-98), and other occasions on which the behavior of the store manager and co-workers caused her and other deaf employees to feel isolated and resented (see D.I. 38 at Ex. A ¶¶ 12-20; Ex. B ¶¶ 20-25). Wal-Mart of course denies that it failed to provide

adequate accommodations for the plaintiff (D.I. 35 at 7-10) and downplays the plaintiff's harassment claims (*id.* at 11-12).

The EEOC undertook an investigation of the plaintiff's claims and, on May 3, 2002, it issued a determination concluding that the plaintiff "was subjected to disability based harassment, denial of reasonable accommodation and differential treatment on the basis of her disability and, therefore, there is reason to believe that a violation of The Americans with Disabilities Act of 1990 has occurred." (D.I. 1 at ¶ 35; D.I. 41 at Ex. A pg 2.) Consequently, the EEOC issued a right to sue notice on October 24, 2002. (D.I. 1 at ¶ 36.) On or about January 22, 2003, the plaintiff took a leave of absence from her job with Wal-Mart and has not returned. (See D.I. 35 at 6 & Ex. K pgs 51-52.)

STANDARD FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56 provides that summary judgment shall be entered if "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The "availability of summary judgment turn[s] on whether a proper jury question [has been] presented." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* In making that determination, one must believe the non-moving parties' evidence and draw all inferences from the evidence in the non-moving parties' favor. *Id.* at 255; *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 456 (1992). Nevertheless, the party bearing the burden of persuasion in the litigation, must, in opposing a summary judgment motion, "identify those facts of record which would contradict the facts identified by the movant." *Port Authority of New York*

and New Jersey v. Affiliated FM Ins. Co., 311 F.3d 226, 233 (3d Cir. 2002)(internal quotes omitted).

DISCUSSION

Wal-Mart contends that a “reasonable accommodation” for a disabled employee is not necessarily the best possible accommodation. (D.I. 35 at 13.) Because it provided interpreting services to the plaintiff and took other steps to assist the plaintiff,² Wal-Mart asserts it met its responsibilities to the plaintiff under the ADA. (See *id.* at 13-14, 18.) As to the assertions of harassment, Wal-Mart argues that they were unrelated to her disability (*id.* at 18-20) and, in any event, were not severe or pervasive (*id.* at 20-22).

The problem with Wal-Mart’s arguments in both respects is it requires me to ignore or minimize, as Wal-Mart does, the evidence that the plaintiff has put forward, which, were a reasonable jury to accept it in its entirety and from which draw every reasonable inference for the plaintiff, could lead to a verdict for the plaintiff.³ I cannot

²Wal-Mart asserts that it

had interpreters stay after meetings to communicate any problems or concerns; Managers and associates wrote notes to communicate with plaintiff when the interpreters were not present; A number of managers and associates attempted to learn sign language; [it] allowed plaintiff to have her own personal advocates to interpret[] for her; [it] installed a TTY system; and [it] installed a light in the cash office that would flicker when someone would ring the bell.

(D.I. 35 at 14.)

³While it may not in itself constitute admissible evidence, it is noteworthy in this regard that the EEOC’s investigation determined that there was reasonable cause to believe that Wal-Mart had violated the plaintiff’s rights under the ADA, including the right to reasonable accommodations and the right to be free of disability based harassment. (D.I. 41 at Ex. A pg 2.)

say at this stage of the case, in light of all the evidence produced, that Wal-Mart has carried its burden of demonstrating that there are no material facts in dispute.

CONCLUSION

Accordingly, it is hereby ORDERED that the defendant's Motion (D.I. 34) is DENIED.

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

July 22, 2004
Wilmington, Delaware