IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CHARLENE WISBEY, Plaintiff,	)	Case No. 4:08CV3093
vs.	)	BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION
CITY OF LINCOLN, NEBRASKA, Defendant.	)	

Defendant's have filed a motion for summary judgment and Plaintiff is filing this motion for summary judgment because we believe that facts which are not in dispute require findings of liability for the Plaintiff and against the Defendant.

We will address our statement of uncontroverted facts first and then address the facts alleged by the Defendant's to be uncontroverted.

PLAINTIFF'S STATEMENT OF UNCONTROVERTED FACTS.

1. Plaintiff, previous to her termination was working full time with some overtime. (Defendant's Exhibit 1, B, page 1.

2. Wisbey had an upper respiratory infection in the winter of 2007 and missed 10 days off work. (Plaintiff's Exhibit 1, Wisbey testimony 60:2-21.)

3. While she was off work for the upper respiratory infection, she

was required to submit doctors notes every 3 days and she did so. (Plaintiff's Exhibit 1, Righter testimony 23:16-24:21.)

4. Wisbey was written up for misuse of leave and it was suggested that she apply for FMLA (Plaintiff's Exhibit 1 Wisbey testimony 60:2-21.)

5. Wisbey did formally apply for intermittent family medical leave. (Defendant's Exhibit 2A.)

6. Wisbey was asked to submit to a fitness for duty exam. (Defendant's Exhibit 2, C.)

7. The request for the fitness for duty exam was because of Wisbey applying for FMLA. (Plaintiff's Exhibit 1, Righter testimony 33:11-15.)

8. Plaintiff was perceived by the Plaintiff to be substantially impaired in concentration (Plaintiff's Exhibit 1, Righter testimony 39:4-7.)

9. Wisbey had never exhibited any problems at work based upon her condition while at work (Plaintiff's Exhibit 1, Righter testimony 17:18-18:5.)

10. Wisbey had never been disciplined for anything other than "misuse" of leave. (Plaintiff's Exhibit 1, Wisbey testimony 63:10-64:2.)

11. Wisbey had been evaluated and been commended for her performance (Plaintiff's Exhibit 1, Wisbey testimony 64:17-65:2.)

12. While Wisbey had to take time off intermittently she would never endanger anyone by going to work unprepared mentally. (Plaintiff's Exhibit 1, Wisbey testimony 66:24-68:8.)

13. Plaintiff's treating physician found her to be capable of function and working full time as an emergency services dispatcher II. (Plaintiff's Exhibit 1, personnel board hearing Exhibit 11.)

14. Wisbey's treating physician found that she only needed time off intermittently when she is experiencing exacerbation of her illness. (Plaintiff's Exhibit 1, personnel board hearing Exhibit 11.)

15. Defendant's refused to consider whether she could work part time or in some other capacity or her treating physicians opinion of whether she could work. (Wisbey's testimony 65:10-66.17: Righter testimony 42:1-24.)

16. Plaintiff was suspended and terminated. (Defendant's Exhibit 2D & 5.)

DEFENDANT'S FACTS

1. Defendant's paragraph #1 is uncontroverted.

2. Defendant's paragraph #2 is uncontroverted.

3. Defendant's paragraph #3 is uncontroverted.

4. Defendant's paragraph #4 is uncontroverted, however, the city perceived her as being substantially impaired in a major life activities of thinking and concentrating and working in a safety sensitive position. (Defendant's Exhibit 1, B, answers to Interrogatory #3.

5. Defendant's paragraph #5 is uncontroverted.

6. Defendant's paragraph #6 is uncontroverted.

7. Defendant's paragraph #7 is uncontroverted.

8. Defendant's paragraph #8 is controverted. Plaintiff had never had difficulty performing her job; she was never disciplined for anything other than sick leave. (Wisbey testimony 63:10-64:2) She has had evaluations and has been commended for her performance. (Wisbey testimony 64:17-65:2)

9. Defendant's paragraph #9 is controverted. (The entire job description is offered at Defendant's 2B.)

10. Defendant's paragraph #10 is controverted. (The entire job description is offered at Defendant's Exhibit 28.)

11. Defendant's paragraph #11 is controverted. Defendant's did require the Plaintiff to submit to a medical evaluation, (Plaintiff's complaint paragraph 12, however, the Plaintiff had

recently applied for intermittent FMLA leave, the Plaintiff had never had a problem at work (Plaintiff's Exhibit 1 Righter testimony 17:18-18:5) As a result of her submitting the FMLA, the city asked Ms. Wisbey to submit to the fitness for duty exam. (Plaintiff's Exhibit 1, Righter testimony, 33:11-15)

12. Defendant's paragraph #12 is not controverted.

13. Defendant's paragraph #13 is not controverted, however, his opinion was based on her needing intermittent leave, which calls for a legal conclusion. Plaintiff's own treating physician found that Plaintiff was perfectly capable of returning to work and the city had never had performance issues related to her condition. (Plaintiff's Exhibit 1, Righter testimony 17. 18 – 5.)

Ms. Wisbey had never been disciplined for any Concentration issues (Plaintiff Exhibit 1, Righter testimony 19:12-21:5.)

The discussions with the other personnel surrounded Ms. Wisbey's leave management. (Plaintiff's Exhibit 1, Righter testimony 22:3-18.)

14. Defendant's paragraph #14 is controverted. The city had other

information from Ms. Wisbey's treating physician and previous fitness for duty exams. (Plaintiff Exhibit 1, Righter testimony 22:14-23:15.)

15. Defendant's paragraph #15 is controverted. The Plaintiff's own physician disagreed with the opinion of Dr. Chesen and the Plaintiff had never had performance issues related to her condition. She simply needed to have the ability to take time off as needed on an intermittent basis. (Plaintiff's Exhibit 1, Wisbey testimony 61:10-62:8.)

16. Defendant's paragraph #16 is controverted. There is no foundation for his statement that they only used him for "one or two" other examinations.

17. Defendant's paragraph #17 is controverted. Ms. Righter told Wisbey that she was on leave of absence for her fitness for duty. (Plaintiff's Exhibit 1 Wisbey testimony.) Ms. Righter believes she told Wisbey they had a finding she was not fit for duty and they couldn't allow her to work that night. (Plaintiff's Exhibit 1, Righter testimony 40:8-23.)

18. Defendant's paragraph #18 is controverted. Plaintiff was discharged for applying for intermittent FMLA and because of

the Defendant's perception that she was substantially impaired in major life activity of concentration.

19. Defendant's paragraph #19 is not controverted, however, it is controverted whether the Plaintiff is actually unfit, which she is not, and she was required to submit to an unlawful medical exam. (Defendant's Exhibit 3, Depo of Wisbey 27:21-2)

20. Defendant's paragraph #20 is controverted. The statement is not supported by the cited portion of the affidavit and there has been no objective evidence that Wisbey was a danger to herself as required by the law.

21. Defendant's paragraph #21 is objected to as irrelevant and a legal conclusion.

ARGUMENT

I.

STANDARD OF REVIEW

THERE ARE GENUINE ISSUES OF MATERIAL FACT PRECLUDING THE ENTRY OF SUMMARY JUDGMENT FOR THE DEFENDANT'S IN THIS CASE

Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may

be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Koltes v. Visiting Nurse Assn., 256 Neb. 740, 591 N.W. 2d 578 (1999); Reinke Mfg. Co. vs. Hayes, 256 Neb. 442, 590 N.W. 2d 380 (1999.)*

Summary judgment is an extreme device, which should not be granted unless the moving party has established a right to judgment with such clarity as to leave no room for controversy, and unless the other party is not entitled to recover under any discernible circumstance. *Vette Co. V. Aetna Casualty & Surety Co.*, 612 F.2d 1076, 1077 (8th Cir. 1980). In passing upon a motion for summary judgment, the District Court must view the facts in the lights most favorable to the party opposing the motion. *Id. See also Reierson v. Resolution Trust Corp.*, 16 F.3d 889, 891 (8th Cir. 1994).

In this case, there are many facts which are not in dispute, however, Plaintiff maintains that the facts mandate judgment for the Plaintiff on liability, not judgment for the Defendant.

ADA

THERE IS NO GENUINE ISSUE AS TO MATERIAL FACT THAT THE DEFENDANT'S REGARDED THE PLAINTIFF AS DISABLED.

The Plaintiff concurs with the Defendant that the Plaintiff must show a prima facie case of disability discrimination. The ADA is statutory.

42 USCA § 12112 provides:

> No covered entity shall discriminate against a qualified individual with a disability of such individual 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.

The term "disability" is defined in the statute at 42 USC §12102(2) to include:

Disability shall mean (a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual, (b) a record of such an impairment, ***or (c) being regarded as having such an impairment.***

In the case at hand, Plaintiff maintains she is not substantially impaired and she is fully capable of working. She does believe the Defendant's regarded her as being substantially impaired in a major life activity of thinking, concentration and working in a broad class of safety sensitive jobs. While the Defendant's now claim they did regard not the Plaintiff as impaired, at the time of her personnel board hearing, Julie

Righter testified she perceived Wisbey as substantially impaired in concentration. (Plaintiff's Exhibit 1, Righter testimony 39:4-7.)

Thus, there is at least a genuine issue of material fact on whether the Defendant's regarded the Plaintiff as impaired, and actually the fact is established as a matter of law on the Plaintiff's side.

Under the facts and circumstances in the following cases, the courts held that a trier of fact could find that an employee was regarded as having or perceived to have, a mental or psychological disability for purposes of the Americans With Disabilities Act (42 U.S.C.A. § 12102(2)(C)).

In *Mastio v. Wausau Service Corp., 948 F. Supp. 1396, 20 A.D.D. 509 (E.D. Mo. 1996),* the court, denying the defendant employer's motion for summary judgment, held that there were disputed issues of material fact as to whether any perceived traumatic stress disorder for purposes of the Americans With Disabilities Act (42 U.S.C.A. § 12102(2)(C)) was related to adverse employment actions affecting the plaintiff's employment. The record was sufficient to support a finding that the defendant regarded the plaintiff as having a severe impairment; it granted her two leaves of absence upon representations from her doctor that she had post-traumatic stress disorder, and plaintiff defined herself as unable to work. However, there was an issue

of fact as to whether the plaintiff's job was eliminated in a reorganization because of any perceived disability or because the position was no longer warranted.

In *Holihan v. Lucky Stores, Inc., 87 F.3d 362, 61 Cal. Comp. Cas. (MB) 602, 17 A.D.D. 13, 5 A.D. Cas. (BNA) 1068 (9th Cir. 1996), cert. denied, 117 S. Ct. 1349, 137 L. Ed. 2d 506, 6 A.D. Cas. (BNA) 928 (U.S. 1997)*, the court, reversing the lower court's granting of summary judgment in favor of the employer, held that there was enough evidence that a trier of fact could find that a terminated employee who had been reported by doctors to be suffering from depression, anxiety, and stress was not rehired because he was regarded by the employer as having a disability and was therefore protected by the Americans With Disabilities Act (42 U.S.C.A. § 12102(2)(C)). The employee's impairment was not severe enough to substantially limit his ability to work. He had been on a leave of absence from the employer for a few months, and during that time he worked many hours pursuing real estate and sign-making businesses. He had acted aberrationally earlier on when he worked for Lucky Stores, and Lucky had called two meetings to discuss this behavior. At one meeting a manager asked Holihan if he was having any "problems"; at the other, the manager encouraged Holihan to seek counseling.

In this case, there is no dispute that the Plaintiff was terminated after submitting to a requested medical exam. Her job was not eliminated. The out come of the medical exam by the Defendant said that she has chronic relapsing depression which intermittently interferes with her ability to function at full capacity at work… (Dr. Chesin's report, Defendant's Exhibit 1 B, page 3.) He basis his opinion that "given her present status" he does "not feel she is fit for duty"… "especially as related to tiredness, her ability to concentrate and her ongoing propensity to likely miss work." (Defendant's Exhibit 1B page 3.)

An eighth circuit case finding sufficient evidence of perceived disability after a medical exam was *Ollie v. Titan Tire Corp. 336 F3d 680 (8th Cir. 2003.)*

In Ollie the court found that the employers decision was based upon speculation stereo-types or myths about people with disabilities and not just on the doctors restrictions. The same is true in this case. The doctor simply found she had depression and it intermittently interferes with her ability to function at full capacity at work. The remainder is simply speculation stereotypes and myths about people with disabilities.This is untenable under the ADA.

THE EMPLOYER IS REQUIRED TO ENGAGE IN THE INTERACTIVE PROCESS

The Plaintiff was summarily terminated from her 27 years of working for the city without any opportunity to address the results of Dr. Chesen's examination or how she could successfully perform her job. No consideration was given to her treating physicians report that she was able to perform her job. The ADA carries with it an obligation for the employer to engage in the interactive process.

The Eighth Circuit Court of Appeals addressed a procedurally similar case. In *Fjellestad v Pizza Hut of America, Inc., 188 F.3d. 944 (8th Cir. 1999)*. The Court, while considering a long time employee who had been on several lengthy leaves of absence and was permanently restricted to working only three days a week, although 35-40 hours, stated:

> Under the circumstances, we must consider whether Pizza Hut failed to provide reasonable accommodations to Fjellestad that would have allowed her to perform the essential functions of the position. Fjellestad is only required to make a facial showing that reasonable accommodation is possible. *Benson, 62 F.3d at 1112*. At that point,

> the burden of production shifts to Pizza Hut to show that it is unable to accommodate. *Fjellestad, Id. at 950.*

The law requires the employer to engage in an interactive process to determine whether a reasonable accommodation can be made. The recent Eighth Circuit case of *Fjellestad v Pizza Hut of America, Inc., 188 F.3d 944 (8th Cir. 1999),* is so instructive on this issue. In *Fjellestad*, the Court held:

> We tend to agree with those courts that hold that there is no per se liability under the ADA if an employer fails to engage in an interactive process. However, we feel the interpretive guidelines set forth when it is Anecessary@ for an employer to initiate an informal interactive process with an employee in need of accommodation. The guidelines set forth the predicate requirement that when the disabled individual requests accommodation, it becomes necessary to initiate the interactive process. Although an employer will not be held liable under the ADA for failing to engage in an interactive process if no reasonable

> accommodation was possible, we find that for purposes of summary judgment, the failure of an employer to engaged in an interactive process to determine whether reasonable accommodations are possible is *prima facie* evidence that the employer may be acting in bad faith. Id. at 952.

The Eighth Circuit adopted the following elements:

> a disabled employee must demonstrate the following factors to show that an employer failed to participate in the interactive process:
>
> 1) the employer knew about the employee=s disability
>
> 2) the employee requested accommodations or assistance for his or her disability;
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> 3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and
>
> 4) the employee could have been reasonably accommodated but for the employers lack of good faith. Id. at 952.

The Defendant's refused to even discuss with Wisbey whether there was anyway to keep her job. They refused to consider her own physicians assessment of her ability to perform.

The Eighth Circuit has held that the failure to engage in the interactive process under the Federal CFR=s is evidence that the Tribunal may consider of the employer=s bad faith.

Thus the Defendant's motion for summary judgment must be overruled. By failing to engage in the interactive process, the Defendant's have shown evidence of their intent to discriminate.

THE RECORD IS ABSENT OF ANY OBJECTIVE FACTUAL EVIDENCE SUFFICIENT TO SUSTAIN A FINDING PLAINTIFF POSED A DIRECT THREAT TO HER OWN OR THE PUBLIC'S SAFETY

The Defendant's have alleged that the Plaintiff's condition posed a direct threat to the **safety of others**. (Defendant's answer Plaintiff 26.) At the time of Plaintiff's termination she was provided a letter saying for your own safety, it is important that you not continue in your present position as an emergency services dispatcher II. But at no time was there any problem

with the Plaintiff's work. First, it must be noted the defense of direct threat is a defense on which the Defendant's bear the burden of proof.

One first wonders why the Defendant's have plead that Wisbey posed a direct threat to the **safety of others** when they initially said it was **for her safety** she not continue in her position. There simply is not any evidence to support either assertion.

29 CFR Section 1630.2(r) Direct Threat

> An employer may require, as a qualification standard, that an individual not pose a direct threat to the health or safety of himself/herself or others. Like any other qualification standard, such a standard must apply to all applicants or employees and not just to individuals with disabilities. If, however, an individual poses a direct threat as a result of a disability, the employer must determine whether a reasonable accommodation would either eliminate the risk or reduce it to an acceptable level. If no accommodation exists that would either eliminate or reduce the risk, the employer may

refuse to hire an applicant or may discharge an employee who poses a direct threat.

An employer, however, is not permitted to deny an employment opportunity to an individual with a disability merely because of a slightly increased risk. The risk can only be considered when it poses a significant risk, i.e., high probability, of substantial harm; a speculative or remote risk is insufficient. See Senate Report at 27; House Report Labor Report at 56-57; House Judiciary Report at 45.

Determining whether an individual poses a significant risk of substantial harm to others must be made on a case by case basis. The employer should identify the specific risk posed by the individual. For individuals with mental or emotional disabilities, the employer must identify the specific behavior on the part of the individual that would pose the direct threat. For individuals with physical disabilities, the employer must

identify the aspect of the disability that would pose the direct threat. The employer should then consider the four factors listed in part 1630:

(1) The duration of the risk;

(2) The nature and severity of the potential harm;

(3) The likelihood that the potential harm will occur; and

(4) The imminence of the potential harm.

Such consideration must rely on objective, factual evidence--not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes--about the nature or effect of a particular disability, or of disability generally. See Senate Report at 27; House Labor Report at 56-57; House Judiciary Report at 45-46. See also *Strathie v. Department of Transportation, 716 F.2d 227 (3d Cir. 1983).* Relevant evidence may include input from the individual with a disability, the experience of the individual with a disability in previous similar positions, and opinions of medical doctors, rehabilitation counselors, or physical therapists

who have expertise in the disability involved and/or direct knowledge of the individual with the disability.

An employer is also permitted to require that an individual not pose a direct threat of harm to his or her own safety or health. If performing the particular functions of a job would result in a high probability of substantial harm to the individual, the employer could reject or discharge the individual unless a reasonable accommodation that would not cause an undue hardship would avert the harm. For example, an employer would not be required to hire an individual, disabled by narcolepsy, who frequently and unexpectedly loses consciousness for a carpentry job the essential functions of which require the use of power saws and other dangerous equipment, where no accommodation exists that will reduce or eliminate the risk.

The assessment that there exists a high probability of substantial harm to the individual, like the assessment that there exists a high probability of substantial harm to others, must be strictly based on valid medical analyses and/or on other objective evidence. This determination must be based on individualized factual data, using the factors discussed above, rather than on stereotypic or patronizing assumptions and must consider potential reasonable accommodations. Generalized fears about risks from the employment environment, such as exacerbation of the disability caused by stress, cannot be used by an employer to disqualify an individual with a disability. For example, a law firm could not reject an applicant with a history of disabling mental illness based on a generalized fear that the stress of trying to make partner might trigger a relapse of the individual's mental illness. Nor can generalized fears about risks to individuals with disabilities in the event of

> an evacuation or other emergency be used by an employer to disqualify an individual with a disability. See *Senate Report at 56*; *House Labor Report* at 73-74; *House Judiciary Report* at 45. See also *Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985)*; *Bentivegna v. U.S. Department of Labor, 694 F.2d 619 (9th Cir.1982)*.

While the Nebraska court made no reference to the CFR, they went through a very similar analysis in the case of *IBP, Inc. v. Sands, 252 Neb. 573 (1997)*. In *IBP*, the Supreme Court found that the Complaint, who suffered from Narcolepsy and worked with dangerous and volatile chemicals. Again, the record indicates no evidence of such a safety concern. IBP's own rating standards found Sands performing at average or above average in the safety category throughout her employment with the company. Again, because IBP articulated no legitimate, nondiscriminatory reason for Sands' employment termination, we find that the district court could have found that IBP discriminated against her in violation of the Nebraska Fair Employment Practice Act, *Id.*

There was no showing of actual, factual and objective evidence that the risk was real, but only generalized fears. This was true even though in

IBP the Complainant would from time to time need to sink down to the floor and there was some evidence her narcolepsy could come on without warning. No actual accidents had happened.

DEFENDANT'S REQUIRED PLAINTIFF TO SUBMIT TO A PROHIBITED EXAM UNDER THE ADA

There is no dispute that the Plaintiff was required to submit to a psychiatric examination. There is no showing that said exam was job related or consistent with business necessity.

The ADA provides:

12,112 (d) (4) Examination and inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

****

The ADA precludes an employer from gathering or disseminating confidential medical information regarding an employee without business necessity. See *Cossette v. Minnesota Power & Light, 188 F.3d 964, C.A.8*

(Minn.),1999. The Examination by Dr.Chesen apparently was to determine whether she had PTSD, and whether it was related to her job. There is personal medical information collected there is information about her family. This information certainly was not job related nor consistent with business necessity.

The Defendants have overlooked the fact that Ms. Wisby has the protection of the ADA whether she is disabled, regarded as disabled or not with respect to the subjecting her to this medical exam. The law is to the contrary. In *Garrison v. Baker Hughes Oilfield Operations*, 287 F.3d 955, 960 (10th Cir. 2002), the court first dealt with the issue of whether the plaintiff had to actually be disabled to be covered by § 12112(d)(3)(C) since the wording protects those "with disabilities." In deciding the plaintiff did not have to be disabled the court relied heavily on the Technical Assistance Manual issued by the EEOC which states that "[t]he results of a medical inquiry or examination may not be used to disqualify *persons who are currently able to perform the essential functions of a job, either with or without accommodations*, because fear or speculation that a disability may indicate a greater risk of future injury, or absenteeism, or may cause future workers' compensation or insurance costs." *Id.* at 960 (emphasis added).

The eighth circuit has adopted a similar view. *Cossette v. Minnesota Power & Light, 188 F.3d 964, C.A.8 (Minn.),1999*.

This is precisely what the city relied upon to find the Plaintiff "unfit". Dr. Chesen found that she had "chronic relapsing depression (unipolar depression) which **intermittently** interferes with her ability to function at full capacity at work vis-à-vis tiredness." He further commented on her "ongoing propensity to likely miss work." (Defendants Exhibit 1B, report of Dr. Chesen) This was not a examination authorized under the ADA. It was simply done to punctuate the decision made by the Defendants to discriminate against the Plaintiff for her perceived disability.

FMLA

Congress enacted the FMLA "to balance the demands of the workplace with the needs of families" by "entitl[ing] employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition." 29 U.S.C. § 2601(b). Employees whose leave falls within the scope of the FMLA receive various protections, most notably, their leave may not be denied, their health benefits are maintained, and their jobs are protected. *29 C.F.R. § 825.100*. The Act guarantees "eligible" employees of covered employers up to 12 workweeks of leave in any 12-month period for any of

the above-mentioned reasons. *29 U.S.C. § 2612(a)(1)*. Those who have been employed by their current employer for at least 12 months, and who have worked at least 1,250 hours within the preceding 12-month period, are eligible for the protections of the FMLA. *29 U.S.C. § 2611(2)(A)*.

There is no question in this case that Wisbey is entitled to the protections of the ADA. She had worked for the city 27 years. There is further, no question that Wisbey was written up for missing time off work for an upper respiratory infection at which time she contacted her doctor every 3 days (Plaintiff's Exhibit 1 Wisbey testimony 60:2-21;) She was required to submit notes from her doctor every 3 days so show she was under the continuing care of a physician and she did so. (Plaintiff's Exhibit 1, Righter testimony 23:16-24:21).

THE CITY WAS APPRISED OF MS. WISBEY'S SERIOUS HEALTH CONDITION AND DISCIPLINED HER FOR TAKING LEAVE.

A serious Health condition is defined under the regulations to the FMLA 29 CFR 825.114:

> (a) For purposes of FMLA, "serious health condition" entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves:

***

(2) Continuing treatment by a health care provider. A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(i) A period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(A) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

The regulations adopted pursuant to FMLA are clear.

29 C.F.R. § 825.302 (C) provides*:*

> (C) An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed for an expected birth or adoption, for example. The employer should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken. In the case of medical conditions, the employer may find it necessary to inquire further to determine if the leave is because of a serious health condition and may request medical certification to support the need for such leave

The Eighth circuit has acknowledged this is all that is required of a person, to advise of the serious health condition.

> The regulations already make it very easy for Ms. Rask to give notice of her intent to take leave. She is not required to understand when she may take FMLA leave, or to state explicitly that she intends to take FMLA leave, or, indeed, even to know that the FMLA exists. All she has to do is apprise her employer of the specifics of her health

> condition in a way that makes it reasonably plain that it is serious and tell her employer that this is why she will be absent. Her employer would then have the duty to investigate whether she is entitled to FMLA leave. *Rask v. Fresenius Medical Care North America* 509 F.3d 466 (C.A.8 ,2007)

The City's policies already make the employee go one step further and provide a doctors certification when a person is gone longer than 3 days and then they do not even count it as FMLA. The Plaintiff was off work 10 days for a viral infection and submitted doctors notes every 3 days showing she was being treated and she was written up for her absences.

THE DEFENDANT'S ALSO RETALIATED AGAINST THE PLAINTIFF FOR SUBMITTING HER REQUEST FOR INTERMITTEN LEAVE UNDER FMLA.

It is undisputed that Plaintiff did submit a request for intermittent FMLA and the Defendant granted that leave. (Defendant's Exhibit, attachment A). They now claim that the certificate signed by her doctor resulted in requiring the additional fitness for duty exam. (Plaintiff's Exhibit 1, testimony of Julie Righter 33:11-19.) The city has the right under the FMLA to seek clarification of the Plaintiff's condition. 29 CFR §825.310(c).

They chose not to but instead, asked her to submit to an examination. The FMLA is very specific about exams that can be requested:

> *29 U.S.C.A. § 2613* Provides*:*
>
> (c) Second opinion
>
> (1) In general
>
> In any case in which the employer has reason to doubt the validity of the certification provided under subsection (a) of this section for leave under subparagraph (C) or (D) of section 2612(a)(1) of this title, the employer may require, at the expense of the employer, that the eligible employee obtain the opinion of a second health care provider designated or approved by the employer concerning any information certified under subsection (b) of this section for such leave.
>
> (2) Limitation
>
> A health care provider designated or approved under paragraph (1) shall not be employed on a regular basis by the employer.
>
> (d) Resolution of conflicting opinions
>
> (1) In general
>
> In any case in which the second opinion described in subsection (c) of this section differs from the opinion in the original certification provided under subsection (a) of this section, the employer may require, at the expense of the employer, that the employee obtain the opinion of a third health care provider designated or approved jointly by the employer and the employee concerning the information certified under subsection (b) of this section.
>
> (2) Finality
>
> The opinion of the third health care provider concerning the information certified under subsection (b) of this section shall be considered to be final and shall be binding on the employer and the employee.

The city agreed to the leave. (Defendant's Exhibit 2, A) Thus, the City accepted the opinion of her health care provider that she was able to perform her job allowing only for intermittent leave. They cannot thereafter, require her to submit to additional examinations.

I am sure the city will argue that the fitness for duty exam is separate from the FMLA exams, however, a case close on point and illustrative is *Albert v. Runyon 6F Supp 2d 57, (D. Mass 1998.)* In *Albert* the postal service did not allow an employee to return from leave after a bout of depression, instead requiring the employee to submit to a fitness for duty exam. The Court found the requirement violated the FMLA.

In this case, the city had no reason to doubt Wisbey's ability to work. She worked for the city for 27 years. She has never been disciplined for anything other than sick leave. (Plaintiff's Exhibit 1 Wisbey's testimony 63:10-64:2). She has evaluations and has been commended for her performance. (Plaintiff's Exhibit 1 Wisbey testimony 64:17-65:2). She has had to use FMLA in the past, but she would never endanger anybody by going to work unprepared mentally. (Plaintiff's Exhibit 1 Wisbey testimony 66:24-68:8.) Absent the FMLA leave, no fitness for duty would have been requested.

The Albert court found:

> Albert's argument is not nearly so broad and is more convincing. She claims that the appropriate way to reconcile the statutes is to recognize that an employee's return from FMLA leave does not in and of itself provide a sufficient business justification to satisfy the ADA standards. Albert maintains that "the business needs of the employer under the ADA are sufficiently met by the provision of a fitness-for-duty certification by the employee pursuant to the FMLA." If it were otherwise, that is, if an employer could justify a fitness-for-duty examination by alleging that a certification adequate under the FMLA was nonetheless insufficient for its business needs, the FMLA's prohibition on requiring any "additional information" beyond "a simple statement of an employee's ability to return to work" would be nullified. *See 29 C.F.R. § 825.310(c)*. In effect, the FMLA answers in the negative the question whether an employee's FMLA leave can itself provide a job-related need for a fitness-for-duty examination where the employer has no present reason to doubt the employee's ability to work.

The City will no doubt argue that they could have requested Wisby to submit to a fitness for duty exam any way, but the *Albert* court found that is not the proper inquiry. The question is not "could they" but "would they"

The fact that the Postal Service *could* have ordered Albert to undergo a psychiatric examination absent her leave is not the determinative criterion. The proper determinative factor is whether an employer *would* have taken a given action absent an employee's FMLA leave. "An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment." *29 C.F.R. § 825.216(a).* Just so, the Postal Service cannot order Albert to undergo a fitness-for-duty examination prior to her return from FMLA leave unless it can establish that it would have ordered such an examination if she had not taken leave. *Id at 65*

The Defendant's would not have had any reason to ask Wisbey for a fitness for duty exam absent her application for intermittent FMLA. Plaintiff was fully capable of working and her rights were violated under both the FMLA and ADA.

CONCLUSION

Plaintiff is entitled to summary judgment on the issues of liability in this case, leaving the issue of damages to the jury. There is no dispute as to material fact that the Defendant's regarded the Plaintiff as disabled. The "fitness for duty exam" was not consistent

with business necessity nor reasonable related to her job. It violated the FMLA.

The Defendant's are not entitled to summary judgment.

CHARLENE WISBEY, Plaintiff,

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CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2008, I electronically filed the foregoing Brief with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

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Joy Shiffermiller

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CHARLENE K. WISBEY, Plaintiff, v. CITY OF LINCOLN, Nebraska, Defendant.	)	4:08CV3093 MEMORANDUM AND ORDER

Pending before me are the cross-motions for summary judgment filed by the plaintiff, (filing no. 21), and the defendant, (filing no. 16).[1] The plaintiff's complaint alleges she is entitled to injunctive relief and damages under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12112 et. seq., and the Family Medical Leave Act (FMLA), 29 U.S.C. § 1612. Filing No. 1. The plaintiff claims the undisputed facts establish that the City of Lincoln ("City") violated the plaintiff's rights under the ADA and FMLA. The City argues the plaintiff has not and cannot prove the elements of her claims, and under the undisputed evidence, the defendant is entitled to judgment as a matter of law.

For the reasons discussed below, the defendant's motion for summary judgment will be granted, and the plaintiff's motion will be denied.

[1]See filing no. 30, "Consent to Exercise of Jurisdiction by a United States Magistrate Judge and Order of Reference," and 28 U.S.C. § 636(c).

STATEMENT OF FACTS

The following summarizes the undisputed facts of record.

The plaintiff was employed as an emergency dispatcher for the City for twenty-seven years until her employment was terminated on April 3, 2007. Julie Righter ("Righter") has been the Communications Manager for the City of Lincoln Emergency Communications/911 Division since 1993. Filing No. 18-2, at CM/ECF p. 19; filing no. 18-3, at CM/ECF p. 1; filing no. 22-3, (Righter testimony), at 19:12-19.

Prior to 2007, the plaintiff was never disciplined for failing to concentrate while performing her job and, with the exception of a probable anxiety attack that occurred sometime between 2003 and 2005, did not exhibit undue anxiety or an inability to concentrate while performing her job. Filing No. 22-3 (Righter testimony), at 21:1-15; (Wisbey testimony), at 62:13-63:6. Her work performance evaluations through December 2006 described her as a good dispatcher with no problems identified. Filing No. 22-3 (Wisbey testimony), at 64:21-65:2.

Righter was aware the plaintiff was under medical care in early January 2007. Filing No. 22-3 (Righter testimony), at 23:16-24. The plaintiff submitted a Family Medical Leave application and medical certification to Righter in late February 2007. Filing No. 18-3, at CM/ECF p. 1. The plaintiff's FMLA leave request stated leave was needed due to "[a] serious health condition that renders me unable to perform the essential functions of my job." Filing No. 18-2, at CM/ECF p. 11; filing no. 18-3, at CM/ECF p. 3.

When the FMLA request was made, the plaintiff was under the care of treating psychiatrist, Mona Pothuloori, M.D. Dr. Pothuloori's medical certification accompanying the FMLA request stated, "Charlene suffers from recurring cycle depression, anxiety . . . it interferes with her sleep, energy level, motivation, concentration . . . ." Filing No. 18-2, at CM/ECF p. 12. The medical certification explained that the condition had existed for several years and was ongoing, and the plaintiff remained under Dr. Pothuloori's care for treatment of depression. Although Dr. Pothuloori's medical certification stated the plaintiff was "able to perform any one or more of the essential functions of the employee's job," (filing no. 18-2, at CM/ECF p. 12), it also stated the plaintiff would need to take leave from work intermittently over the following six months or longer. Filing No. 18-2, at CM/ECF p. 12; filing no. 18-3, at CM/ECF p. 4.

Righter reviewed the FMLA request and Dr. Pothuloori's medical certification and noticed that, according to the certification, the plaintiff's mental state interfered with her concentration and energy level. Righter questioned whether the plaintiff was capable of performing the functions of her job because an "Emergency Service Dispatcher II must operate with a high level of concentration as they are often required to make split second decisions that may have life and death implication relative to both the public safety of first responders as well as the general public." Filing No. 18-3, at CM/ECF p. 1 ¶ 4. See also, filing no. 22-3 (Righter testimony), at 18:6-24. Righter spoke with Don Taute ("Taute"), Personnel Director, and expressed her concern that the plaintiff's impaired energy level and inability to concentrate may make her unable to perform her job. Filing No. 18-2, at CM/ECF p. 1, ¶¶ 3-4.

At Taute's suggestion, and based on the information disclosed in the plaintiff's FMLA request and the medical certification, Righter asked William Kostner ("Kostner"), Risk Manager for the City, to schedule a fitness-for-duty examination for the plaintiff. Filing No. 18-2, at CM/ECF p. 1, ¶¶ 3-4, filing no. 18-3, at CM/ECF pp. 1-2, ¶ 5; filing no. 22-3 (Righter testimony), at 33:11-17. On March 14, 2007, Righter notified the plaintiff that she needed to attend a fitness-for-duty examination by Dr. Eli Chesen on March 22, 2007. Filing No. 18-3, at CM/ECF pp. 1-2 ¶¶ 5-6 & p. 8.

Kostner sent a letter to Dr. Chesen on March 15, 2007, and asked the doctor to examine the plaintiff and provide a professional medical opinion as to whether the plaintiff was medically qualified to continue working as an Emergency Service Dispatcher II for the City. Filing No. 18-2, at CM/ECF p. 3. The City provided Dr. Chesen with a copy of the plaintiff's FMLA leave request and accompanying information, (filing no. 18-2, at CM/ECF pp. 11-12), her lost time record, (filing no. 18-2, at CM/ECF pp. 13-16), and materials explaining the Emergency Service Dispatcher II position. Filing No. 18-2, at CM/ECF p. 1, ¶ 5 & pp. 3-10.

The position description for an Emergency Service Dispatcher II stated that such employees must receive information concerning requests for service; dispatch police and sheriff's units to calls for service; monitor and respond to radio transmissions; keep informed of the location and status of law enforcement units in the field; dispatch fire and EMS to calls for service; monitor and respond to radio transmissions; and keep informed of fire and

medical units in the field. Filing No. 18-2, at CM/ECF pp. 4-6, 8. The job requires:

> [P]rompt, efficient and accurate receiving, dispatching and processing of emergency service calls over the 911 and related seven-digit systems from the general public and other authorized personnel requiring emergency actions by the police, sheriff, fire, EMS units, fire/rescue squads and other emergency services[, and] the ability to think and act quickly and calmly in emergency situations, . . . obtain accurate and complete information from callers who may be frantic and incoherent due to emergency conditions[, and] function accurately while working under considerable pressure.

Filing No. 18-2, at CM/ECF pp. 8-9.

As described by the plaintiff, her mental condition intermittently interferes with her ability to perform this work.

> At times my depression arises, and it makes me very tired where I can sleep 20 straight hours. And that's where it interferes. Being tired at work was not ever a problem. But going on a string of six, seven straight days, I can get very tired due to the medication I'm on or due to the fact that I just get tired. So that's the only time I've ever had to call in sick is that -- when my body just shuts down and gets tired, it wants rest and rebooted.

Filing No. 22-3 (Wisbey testimony), at 61:20-62:3. The plaintiff claims she has never had difficulty discerning whether it was safe for her to report to work, and she has never had a problem with her concentration level while at work. Filing No. 22-3 (Wisbey testimony), at 62:4-12.

The plaintiff requested intermittent Family Medical Leave on February 24, 2007 because there are times she recognizes, in

advance, that she will be unable to do the job that day. Filing No. 22-3 (Wisbey testimony), at 65:3-9. As explained by the plaintiff:

> Normally, I work third shift, so I'm usually up by 8:30 or nine o'clock at night. I can tell by the time that I get up that -- whether I am fit, judge on my own self, to be able to go in there and do my job. I would never endanger anybody on the street by going in there tired or unprepared mentally. And that's when I stay home.

Filing No. 22-3 (Wisby testimony), at 66:13-19. The plaintiff had, over the three years preceding her termination, used substantial amounts of sick leave and Family Medical Leave. Filing No. 18-2, at CM/ECF pp. 13-16. The plaintiff requested Family Medical Leave four or five times in the past for her foot surgery, carpal tunnel surgery, and depression. Her requests for leave were never denied. Filing No. 26-2 (Wisbey testimony), at 24:10-25.

Dr. Chesen examined the plaintiff and issued a report dated March 22, 2007. In that report, Dr. Chesen noted the plaintiff reported having problems with depression for the last ten years, and insomnia for the last five years. The plaintiff had received treatment from her psychiatrist, Dr. Pothuloori, for the past two years, with scheduled visits every three to four months. The plaintiff told Dr. Chesen that her anxiety was under control, but her insomnia and depression were not under control. She reported that when she receives radio calls involving endangered lives she witnesses the event through the radio. She reported that her psychiatrist, chiropractor, and others had all advised her to leave her job. Filing No. 18-2, at CM/ECF at pp. 19-21. Dr. Chesen concluded:

> [Plaintiff] has chronic relapsing depression (unipolar depression) which intermittently interferes with her ability to function at full capacity at work vis-a-vis tiredness.
>
> Given her present status, I do not feel she is fit for duty as described in her job description, especially as related to tiredness, her ability to concentrate and her ongoing propensity to likely miss work.

Filing No. 18-2, at CM/ECF at p. 21.

Kostner received a copy of Dr. Chesen's report on March 28, 2007, and forwarded it to Taute and Righter. Filing No. 18-2, at CM/ECF p. 1, ¶ 7. Based on Dr. Chesen's conclusion that the plaintiff was not fit for duty, the City placed the plaintiff on Administrative Leave with Pay on March 29, 2007. Filing No. 18-2, at CM/ECF p. 2, ¶ 8; filing no. 18-3, at CM/ECF p. 2, ¶ 7-8. Righter told the plaintiff that the City was concerned the plaintiff would have a problem performing her job duties because Dr. Chesen found that she was unfit for duty. Righter also told the plaintiff that the City could not allow her to work in a position she was found to unfit to perform, and that as a consequence, the plaintiff was being placed on Administrative Leave with Pay. Filing No. 18-3, at CM/ECF p. 2, ¶ 8. The plaintiff told Righter she believed she could perform her job, and asked Righter if she could do something else or go part time since her job meant so much to her and she was so close to retirement. Righter responded that the plaintiff could not work part time. Filing No. 22-3 (Wisbey testimony), at 65:21-66:17.

The plaintiff was notified that a meeting was scheduled for April 3, 2007 to discuss plaintiff's employment with the City. Filing No. 18-3, at CM/ECF p. 2, ¶ 8 & p. 9. On April 3, 2007, the city met with the plaintiff and provided her with a letter

explaining that Dr. Chesen had found her unfit for duty and her employment was being terminated. Filing No. 18-2, at CM/ECF p. 2, ¶ 9; filing no. 18-3, at CM/ECF p. 2 ¶ 9. The letter stated "for your own safety it is important that you not continue in your present position as an Emergency Service Dispatcher II." Filing No. 18-2, at CM/ECF p. 2, ¶ 10; filing no. 18-3, at CM/ECF p. 10. The plaintiff was terminated because Dr. Chesen found her unfit to perform her job. Filing No. 18-4, at CM/ECF pp. 2-3.

No one contacted and solicited additional information or opinions from the plaintiff's treating psychiatrist, Dr. Pothuloori until after the plaintiff's employment was terminated. Filing No. 22-3 (Righter testimony), at 40:24-41:4. In an undated report (filing no. 22-3, at CM/ECF pp. 23-24), a copy of which was not provided to Righter until the night before the plaintiff's City Personnel Board hearing, Dr. Pothuloori stated she disagreed with Dr. Chesen's conclusions and asserted the plaintiff was fit to perform her job with the City. Filing No. 22-3 (Righter testimony), at 41:5-42:15.

Kostner, who drafted the letter advising the plaintiff that her employment was terminated, administers the city's Long Term Disability Plan. The termination letter encouraged the plaintiff "to avail [her]self of the City's long term disability benefits." Filing No. 18-2, at CM/ECF p. 11. Under the terms of the City's LTD policy, for the first 24 months when benefits are payable, a person is totally "disabled" if a disability prevents the employee from performing the duties of his or her regular occupation. Filing No. 18-2, at CM/ECF p. 2, ¶ 12 & p. 33, ¶ 7.

SUMMARY OF ARGUMENTS

In support of her motion for summary judgment, the plaintiff claims the undisputed facts establish that the defendant regarded her as disabled and terminated her employment in violation of the ADA. Filing No. 23, pp. 9-11. Wisbey further argues the City violated the ADA by failing to engage in the interactive process to determine whether reasonable accommodations were available. Filing No. 23, pp. 13-16. The plaintiff claims there is no evidence that her continued employment with the City posed any risk to the health and safety of others, (filing no. 23, pp. 17-23), there was no business necessity justifying the City's decision to require plaintiff to submit to a fitness-for-duty examination, and that requiring the medical exam violated plaintiff's rights under the ADA, (filing no. 23, pp. 23-25).

The plaintiff further argues the City violated the FMLA by disciplining the plaintiff for exercising her right to medical leave (filing no. 23, pp. 25-29), and when plaintiff submitted a request for intermittent medical leave, the City unlawfully retaliated by requiring the plaintiff to submit to a fitness-for-duty examination and ultimately terminating plaintiff's employment. Filing No. 23, pp. 29-33.

In support of its motion for summary judgment, the City notes that the plaintiff does not allege she is disabled, but only that she was regarded as disabled. The City claims the plaintiff was not discharged based on a perceived disability, but rather on the independent medical determination that the plaintiff was, in fact, unable to perform her job as an emergency dispatcher. Filing No. 17, p. 8; filing no. 25, p. 2. The City claims it had a reasonable basis for questioning whether the

plaintiff could perform her job, and under such circumstances, demanding a fitness-for-duty examination is not evidence of discrimination. Filing No. 17, pp. 9-11; filing no. 25, p. 3. The City further argues that suggesting the plaintiff apply for Long Term Disability benefits under the City's LTD plan does not indicate the City regarded the plaintiff as disabled for the purposes of the ADA, (filing no. 17, pp. 10-12); terminating the plaintiff "for [her] own safety" based on a doctor's opinion does not demonstrate the City regarded the plaintiff as disabled, (filing no. 17, p. 12); the plaintiff cannot show she was actually qualified to perform the essential functions of her emergency dispatch position, (filing no. 17, pp. 12-13); and the City need not provide reasonable accommodations to a person who does not claim she is actually disabled, but rather claims she was regarded as disabled. Filing No. 17, pp. 13-14; filing no. 25, pp. 2-3. The City also argues it had a legitimate, nondiscriminatory reason for terminating the Plaintiff's employment; specifically, Wisbey was terminated because she was found unfit for duty by a physician. Filing No. 17, p. 13.

As to the plaintiff's FMLA claim, the City argues there is no evidence the plaintiff was subjected to an adverse employment action for exercising her rights under the FMLA because requiring a fitness-for-duty exam is not an adverse employment action, more than a temporal connection between the request for FMLA and plaintiff's employment termination is necessary to satisfy the causation requirement, and the City had a legitimate nondiscriminatory reason for terminating the plaintiff's employment. Filing No. 17, pp. 15-16; filing no 25, pp. 4-6. Finally, the City never denied the plaintiff's request for, and never interfered with her right to take, family medical leave. Filing No. 25, pp. 3-5.

LEGAL DISCUSSION

I. STANDARD OF REVIEW

A motion for summary judgment is "properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). In response to the moving party's evidence, the opponent's burden is to "come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

> Once the moving party has met its burden of showing the absence of a genuine issue of material fact and an entitlement to judgment as a matter of law[,] . . . the non-moving party may not rest on the allegations of his pleadings, but must set forth specific facts, by affidavit or other evidence, showing that a genuine issue of material fact exists.

Krein v. DBA Corp., 327 F.3d 723, 726 (8th Cir. 2003).

Although "summary judgment should seldom be granted in discrimination cases," (Bassett v. City of Minneapolis, 211 F.3d 1097, 1099 (8th Cir. 2000)), summary judgment should be granted in a discrimination case when the plaintiff has failed to present "any significant probative evidence tending to support the complaint," or has failed to "make a sufficient showing on every essential element of its claim on which it bears the burden of

proof." Buettner v. Arch Coal Sales Co., Inc., 216 F.3d 707, 718 (8th Cir. 2000). "[T]he focus of inquiry at the summary judgment stage 'always remains on the ultimate question of law: whether the evidence is sufficient to create a genuine issue of fact as to whether the employer intentionally discriminated against the plaintiff because of [the protected characteristic].'" Strate v. Midwest Bankcentre, Inc., 398 F.3d 1011, 1018 (8th Cir. 2005) (quoting Rothmeier v. Investment Advisers, Inc., 85 F.3d 1328, 1336-37 (8th Cir. 1996)).

II. THE PLAINTIFF'S CLAIMS FOR RELIEF.

The plaintiff seeks recovery under the ADA and the FMLA. These congressional acts create fundamentally different employment rights. The ADA was enacted to eliminate discrimination against qualified individuals with disabilities. 42 U.S.C. § 12101. The FMLA was created to afford job security to "employees who have serious health conditions that prevent them from working for temporary periods." 29 U.S.C. § 2601(a)(4). "While the ADA's protection is almost perpetual, lasting as long as the employee continues to meet the statutory criteria, the FMLA grants eligible employees 12 weeks of leave to deal with a specified family situation or medical condition." Spangler v. Federal Home Loan Bank of Des Moines, 278 F.3d 847, 851 (8th Cir. 2002)(citing 29 U.S.C. § 2612).

The ADA does not protect an employee unable to perform the essential functions of the employment position, while the FMLA protects employees who are temporarily unable to perform their job from losing the job during the leave period. See 29 C.F.R. § 825.115. FMLA leave affords the employee time for treatment and recovery so that the employee may return to work. Therefore, a

determination that an employee was not qualified to perform the essential functions of her position under the ADA does not automatically bar the employee's claim under the FMLA. However, if the employee returns from FMLA leave, and remains "unable to perform an essential function of the position because of a physical or mental condition, . . . the employee has no right to restoration to another position under the FMLA. However, the employer's obligations may be governed by the Americans with Disabilities Act (ADA)." Reynolds v. Phillips & Temro Indus., Inc., 195 F.3d 411, 414 (8th Cir. 1999)(quoting 29 C.F.R. § 825.214(b)).

The facts underlying the plaintiff's claims highlight the interrelationship between, but distinct purposes and application of, the ADA and FMLA.

1. The Americans With Disabilities Act.

An ADA plaintiff bears the initial burden of proving a prima facie case of discrimination. If the plaintiff meets this burden, then the employer has the burden to articulate a legitimate, nondiscriminatory reason for the adverse employment action. If the defendant meets this burden, the plaintiff must then show that the defendant's proffered reason was a pretext for discrimination. Dovenmuehler v. St. Cloud Hosp., 509 F.3d 435 (8th Cir. 2007).

An ADA claimant must make a prima facie showing that she: (1) has a disability within the meaning of the ADA; (2) is able to perform the essential functions of the job, with or without reasonable accommodation; and (3) suffered an adverse employment action as a result of the disability. Duty v. Norton-Alcoa

Proppants, 293 F.3d 481 (8th Cir. 2002). To prove she has a disability within the meaning of the ADA, the plaintiff claimant must establish (1) a physical or mental impairment that substantially limits a major life activity, (2) a record of such impairment, or (3) that she is regarded as having such an impairment. Duty, 293 F.3d at 491. See also, 42 U.S.C.A. § 12102.[2]

The plaintiff does not allege she has an actual disability as that term is defined under the ADA. Rather, she claims the defendant regarded her as having such an impairment.[3] To prove her rights under the ADA were violated because the City "regarded" her as disabled, the plaintiff must prove the City mistakenly believed the plaintiff had an impairment, or that it mistakenly believed the impairment the plaintiff actually had substantially limited her ability to perform her job.[4] The ADA's

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[2]Although the ADA was amended by the Americans with Disabilities Amendments Act of 2008 effective January 1, 2009, these three categories of "disability" are included in both the current and pre-amendment versions of the ADA.

[3]This case was scheduled to be tried on April 19, 2009. At this stage of the litigation, and with no motion for leave to amend filed and pending, the plaintiff's claims for relief will be limited to what she has pleaded.

[4]The express purpose of The Americans with Disabilities Amendments Act of 2008 was to broaden the scope of the ADA and to enact legislation effectively overruling the holdings in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999), and Toyota Motor Manufacturing v. Williams, 534 U.S. 184 (2002). Pub.L. No. 110-325, § 2(b)(2-5)(2008).

Congress also intended to "reinstate the reasoning of the Supreme Court in School Board of Nassau County v. Arline, 480 U.S. 273 (1987) which set forth a broad view" of regarded as disabled. Pub.L. No. 110-325, § (2)(b)(3). Under The Americans with Disabilities Amendments Act of 2008:

"provision addressing perceived disabilities is intended to combat the effects of archaic attitudes, erroneous perceptions, and myths that work to the disadvantage of persons with or regarded as having disabilities." Breitkreutz v. Cambrex Charles City, Inc., 450 F.3d 780, 784 (8th Cir. 2006). See also, 42 U.S.C.A. § 12101(a)(2)(effective January 1, 2009)("[I]n enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers."). The "regarded as" provision of the ADA extends coverage to those with an impairment that "might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 282-283 (U.S. 1987)(see also, Pub.L. No. 110-325, § (2)(b)(3), which "reinstated" the reasoning of School Board of Nassau County v. Arline, 480

> An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

42 U.S.C. § 12102. Courts have held that these amendments are not applicable to alleged discriminatory acts that occurred prior to January 1, 2009. See e.g., Ekstrand v. School Dist. of Somerset, 2009 WL 564672, 7 (W.D.Wis. 2009). However, I need not address whether the 2008 ADA amendments apply retroactively because I find that under either the pre-amendment or current version of the ADA, the plaintiff has failed to meet her burden of proof.

U.S. 273 (1987)).

The City terminated the plaintiff based on the report of a psychiatrist, Dr, Eli Chesen, who examined the plaintiff and concluded she was not able to perform her duties as a emergency dispatcher for the City. Although the plaintiff claims this report should not have been relied on by the City because Dr. Chesen was not truly independent, but rather a hired expert for the City, she has presented no evidence that Dr. Chesen's opinions were rendered as a result of bias or that the City had any reason to believe they were.

To the contrary, Dr. Chesen's opinions were supported, not undermined, by the plaintiff's own statements and the statements of her treating physician on the medical certification form accompanying the plaintiff's FMLA leave request. On her FMLA request, the plaintiff acknowledged having a "serious health condition that renders me unable to perform the essential functions of my job," (filing no. 18-2, at CM/ECF p. 11), and during her examination, she told Dr. Chesen that her insomnia and depression were not under control, and her psychiatrist, chiropractor, and others had advised her to leave her job. Dr. Pothuloori's medical certification stated the plaintiff suffers from depression and anxiety that interfere with her "sleep, energy level, motivation, concentration." Filing No. 18-2, at CM/ECF p. 12. The certification states the plaintiff is "able to perform one or more of the essential functions of the employee's job," but she will need time off intermittently to perform those functions over the next six months or longer. Filing No. 18-2, at CM/ECF p. 12.

Common sense dictates, and the City's written description of the Emergency Service Dispatcher II position confirms, that those performing the job of a emergency dispatcher must remain alert, and consistently able to concentrate, and respond appropriately and quickly. The plaintiff argues she can perform the emergency dispatcher job because she knows when she is able to fulfill her job requirements based on how she feels when she wakes up two or three hours before her shift begins. However, the significant responsibilities of an emergency dispatcher cannot be overemphasized. Such employees are often the first-line actors in assisting members of the public, law enforcement, fire department, and medical profession in promptly, safely, and appropriately responding to emergencies. The stress an emergency dispatcher may encounter on any particular shift is wholly unpredictable, yet the person performing this job must be able to reliably report for work and perform the job. Although the plaintiff believes she should be allowed to decide, on a night-by-night basis, whether she is capable of working, her need to do so actually "implies that she is not qualified for a position where reliable attendance is a bona fide requirement . . . ." Spangler, 278 F.3d at 853. "[R]egular attendance at work is an essential function of employment." Brannon v. Luco Mop Co., 521 F.3d 843, 849 (8th Cir. 2008).

It is undisputed the City did not terminate the plaintiff based on archaic attitudes, erroneous perceptions, myths, and stereotypes, but rather on the opinion of a psychiatrist who examined the plaintiff and was informed of her job requirements. When an employee's termination is based upon the recommendations

of a physician, it is not based upon myths or stereotypes about the disabled and does not establish a perception of disability.[5] Kozisek, 539 F.3d at 935; Breitkreutz, 450 F.3d at 784. See also, School Bd. of Nassau County, Fla., 480 U.S. at 285 (reinstated under Pub.L. No. 110-325, § (2)(b)(3) and explaining that by enacting employment laws to protect the disabled, Congress intended to replace "reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments").

The plaintiff argues that requiring the plaintiff to have a fitness-for-duty examination proves the City perceived the plaintiff as disabled and violated 42 U.S.C.A. § 12112(d)(4)(A) of the Act. The ADA states:

> A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a

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[5]The plaintiff claims Dr. Pothuloori did not agree with Dr. Chesen, and the City acted improperly by failing to consider Dr. Pothuloori's opinion. Dr. Pothuloori believes the plaintiff suffers from PTSD; Dr. Chesen does not. In all other respects, Dr. Pothuloori's opinion letter does not challenge Dr. Chesen's medical opinions, but states the plaintiff can perform her job provided she is allowed intermittent leave.

Dr. Pothuloori's written opinion is undated, and based on the evidence of record, it was not presented to the City until after the decision to terminate the plaintiff's employment was made. The report is therefore irrelevant in determining whether the City violated the ADA at the time it decided to terminate the plaintiff' employment. Kozisek v. County of Seward, Nebraska, 539 F.3d 930, 935 (8th Cir. 2008)(holding an after-acquired physician report was not relevant in deciding if the County, at the time it imposed restrictions on plaintiff's continued employment, based its decision on misconceptions, myths or stereotypes). Moreover, the requirements of the ADA, not the physicians' recommendations, govern whether the employer must accommodate any impairments identified by the physicians.

> disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

42 U.S.C.A. § 12112(d)(4)(A).[6]

The plaintiff's fitness-for-duty examination was ordered because the information within the plaintiff's FMLA request and accompanying medical certification indicated that due to the plaintiff's mental impairments, her sleep, energy level, motivation, and ability to concentrate were intermittently impaired. The City was thereby placed on notice, and was reasonably concerned, that the plaintiff may have difficulty maintaining the level of alertness and concentration required of an emergency dispatcher. "The steps taken to reassure an employer that an employee is fit for duty where there is a legitimate concern about an employee's ability to perform a particular job are not proof . . . that the employer regarded the employee as disabled." Krocka v. City of Chicago, 203 F.3d 507, 515 (7th Cir. 2000)("It was entirely reasonable, and even responsible," for the police department to evaluate the officer's fitness for duty "once it learned that he was experiencing difficulties with his mental health.").

The plaintiff advised the City that she was experiencing intermittent problems with her concentration, energy level, motivation, and sleep. In such a case, a fitness-for-duty examination is job related and consistent with business necessity. Although the City was not aware of any past episodes wherein the plaintiff was unable to perform her job due to mental

[6]This provision was not amended in The Americans with Disabilities Amendments Act of 2008.

impairments, the City was not required to "forgo a fitness for duty examination to wait until a perceived threat becomes real or questionable behavior results in injuries." Watson v. City of Miami Beach, 177 F.3d 932, 935 (11th Cir. 1999)(holding that where a police department reasonably perceives an officer to be even mildly paranoid, hostile, or oppositional, a fitness for duty examination is job related and consistent with business necessity).

In the termination letter given to the plaintiff, the City suggested she may wish to apply for Long Term Disability benefits under the City's policy. This suggestion does not prove the City perceived the plaintiff as disabled based on erroneous or stereotypical assumptions concerning persons suffering from a mental health disorder. The City made this suggestion after a doctor found the plaintiff was not fit for duty and the decision to terminate the plaintiff's employment was made. Under such circumstances, reminding the plaintiff of potentially useful employee benefits was appropriate and cannot be construed as evidence that the City violated the ADA.

The plaintiff argues the defendant failed to engage in the interactive process and failed to afford the plaintiff reasonable accommodations. The plaintiff does not claim to have "a physical or mental impairment that substantially limits one or more of the major life activities." 42 U.S.C. § 12102(1)(A).[7] The plaintiff alleges she was "regarded as" disabled in violation of the ADA. The reasonable accommodation requirement makes sense in a case of actual disability, but it "makes considerably less sense in the perceived disability context." Weber v. Strippit, Inc., 186 F.3d

[7]This definition of an actual disability was not changed in the The Americans with Disabilities Amendments Act of 2008.

907, 916 (8th Cir. 1999). Under Eighth Circuit law, employers are not required to provide reasonable accommodations to employees "regarded as" disabled. Id.

Even if the City was required to afford the plaintiff reasonable accommodations, the plaintiff has failed to "make a facial showing that a reasonable accommodation is possible." Brannon v. Luco Mop Co., 521 F.3d 843, 848 (8th Cir. 2008). The plaintiff asked if she could work part-time, (see 42 U.S.C. § 12111 (9)(B)), and this request was denied. However, there is no medical evidence that being assigned a part-time work schedule would alleviate the plaintiff's intermittent inability to sleep or concentrate, or that the plaintiff could, even with a reduced schedule, reliably report for work.

Consistent with Dr. Pothuloori's medical certification and her later-acquired opinion letter, the plaintiff's FMLA leave request asked for intermittent leave. Perhaps the plaintiff is arguing that granting this request is a reasonable accommodation.[8] However, although allowing a medical leave of absence might, in some circumstances, be a reasonable accommodation, "an employer is not required by the ADA to provide

[8]The plaintiff's evidence includes the report of Dr. Pothuloori which states the plaintiff can and should be allowed to work in an environment that permits the plaintiff to intermittently not report for work due to an exacerbation of her illness. Dr. Pothuloori states the plaintiff can perform her job, but notes the plaintiff has required time off from work intermittently "when she experiences exacerbation of her illness," and her Post Traumatic Stress Disorder (PTSD) symptoms "continue to erupt from time to time." Filing No. 22-3, at CM/ECF p. 23. In other words, Dr. Pothuloori does not contradict Dr. Chesen's opinion that the plaintiff will likely continue to miss work, but she believes the City should accommodate these sporadic and unscheduled absences.

an unlimited absentee policy." Brannon, 521 F.3d at 849. See also, Pickens v. Soo Line R.R. Co., 264 F.3d 773, 778 (8th Cir. 2001) (holding that plaintiff's suggested accommodation of "be[ing] able to work only when he feels like working" is unreasonable as a matter of law).

The plaintiff has failed to show the defendant perceived the plaintiff as disabled as that term is defined under the ADA. There is no evidence the City's decision to terminate the plaintiff's employment was based on archaic and erroneous beliefs regarding those inflicted with anxiety, insomnia, depression, Post Traumatic Stress Disorder, or any other mental impairment. The plaintiff claims a right to recovery solely on the basis of perceived disability and, as such, cannot claim the defendant failed to reasonably accommodate her mental impairment. Finally, even if the defendant was legally obligated to offer reasonable accommodations, the plaintiff has failed to make a facial showing that any such accommodations existed. The plaintiff's claim for recovery under the ADA must be denied as a matter of law.

II. The Family Medical Leave Act.

Employees can assert two distinct types of claims under the FMLA. Interference or "(a)(1)" claims arise when an employer has denied or interfered with an employee's exercise of substantive rights under the FMLA, while retaliation or "(a)(2)" claims arise when the employer has discriminated against an employee who has exercised those rights. Stallings v. Hussmann Corp., 447 F.3d 1041, 1050 (8th Cir. 2006).

To present an interference claim, the plaintiff must show only that she was entitled to a benefit denied. An employee can

prove interference with an FMLA right regardless of the employer's intent. "Interference includes 'not only refusing to authorize FMLA leave, but discouraging an employee from using such leave.'" Stallings, 447 F.3d at 1050 (quoting 29 C.F.R. § 825.220(b)). An employer interferes with the exercise of protected FMLA rights when, due to consequences imposed by the employer, employees become reluctant to exercise their rights for fear of being fired or disciplined. Stallings, 447 F.3d at 1050. "An employee can prevail under an interference theory if [she] was denied substantive rights under the FMLA for a reason connected with [her] FMLA leave." Stallings, 447 F.3d at 1050-51.

Under the undisputed evidence of record, the plaintiff's right to family medical leave, as provided for under the FMLA, was never denied. Prior to February 2007, the plaintiff made four or five requests for FMLA leave, each of which was granted. The plaintiff has cited to no evidence that she reluctant to request FMLA leave because she feared she would be fired or disciplined.

The plaintiff's FMLA leave request signed on February 24, 2007 requested intermittent leave, to be determined by the plaintiff, for the following six months or longer. An FMLA violation occurs only when an employer improperly denies a request for leave, (Reed v. Lear Corp., 556 F.3d 674, 681 (8th Cir. 2009) (emphasis added)), and the City was not required under the FMLA to grant the plaintiff's February 2007 request. "[T]he FMLA does not provide an employee suffering from depression with a right to 'unscheduled and unpredictable, but cumulatively substantial, absences' or a right to 'take unscheduled leave at a moment's notice for the rest of her career.'" Spangler, 278 F.3d

at 853 (quoting Collins v. NTN-Bower Corp., 272 F.3d 1006, 1007 (7th Cir. 2001)). To the extent the plaintiff may be alleging an FMLA interference claim, her claim must be denied as a matter of law.

To survive summary judgment on her FMLA retaliation claim, the plaintiff must present evidence that: (1) she exercised rights protected under the FMLA; (2) was adversely affected by an employment decision; and (3) there was a causal connection between exercising his rights under the FMLA and the adverse employment decision. McBurney v. Stew Hansen's Dodge City, Inc., 398 F.3d 998, 1002 (8th Cir. 2005). An FMLA retaliation claim requires proof of retaliatory intent, but an employee pursuing an FMLA interference claim need only show that he was entitled to the benefit denied. Stallings, 447 F.3d at 1050. Unlike FMLA interference claims, retaliation claims are analyzed under the McDonnell Douglas burden-shifting framework. Stallings, 447 F.3d at 1051.

The plaintiff was not entitled to the self-determined, intermittent FMLA leave she requested in February 2007. In other words, the right to take such leave was not protected under the FMLA. While the plaintiff was terminated after she submitted this FMLA request, the termination was not caused by the fact that such a request was made, but was based on the medical information within the request and arising thereafter from the fitness-for-duty examination, both of which indicated she could not perform her job. "[T]he FMLA does not provide leave for leave's sake, but instead provides leave with an expectation an employee will return to work after the leave ends." Throneberry v. McGehee Desha County Hosp., 403 F.3d 972, 978 (8th Cir. 2005). The FMLA does not require an employer to retain an employee who

has not made a valid FMLA leave request; is not seeking temporary leave to recover from a disability or impairment, but rather on-going and intermittent leave; and cannot perform the essential functions of her job. Throneberry, 403 F.3d at 978("If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition, the employee has no right to restoration to another position under the FMLA.").

Although the plaintiff may be claiming the fitness-for duty examination was unlawfully requested under the FMLA, as previously explained, the examination performed was job related and consistent with business necessity, and thus comported with the terms of the ADA. The fitness-for-duty examination was not requested merely because the plaintiff requested FMLA leave, but because the plaintiff's request indicated she may not be able to perform the essential functions of her employment as an emergency dispatcher. The FMLA is not violated when, in accordance with the ADA, the employer requires the employee to undergo a fitness-for-duty examination. Porter v. U.S. Alumoweld Co, Inc., 125 F.3d 243, 247 (4th Cir. 1997). See also, 29 C.F.R. § 825.312 ("After an employee returns from FMLA leave, the ADA requires any medical examination at an employer's expense by the employer's health care provider be job-related and consistent with business necessity.").

The plaintiff has failed to show that in requesting indefinite, intermittent, self-determined leave, she exercised a right to leave protected under the FMLA. She has also failed to show that her employment termination was caused by the fact that she requested leave. The plaintiff's employment was terminated because the information within the FMLA leave request placed the

City on notice that the plaintiff may not be able to perform her job, this information prompted the City to order a fitness-for-duty examination, and the psychiatrist who performed the examination concluded the plaintiff was unable to perform an emergency dispatcher job due to ongoing mental problems. The plaintiff's employment was terminated because she was unable to perform her job, not because she requested family medical leave. The plaintiff's FMLA retaliation claim must be denied as a matter of law.

IT THEREFORE HEREBY IS ORDERED:

1. The plaintiff's motion for summary judgment, (filing no. 21), is denied.

2. The defendant's motion for summary judgment, (filing no. 16), is granted.

3. This case is dismissed in its entirety.

4. Judgment shall be entered by separate document.

DATED this 10th day of April, 2009.

BY THE COURT:

s/ David L. Piester
David L. Piester
United States Magistrate Judge

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 09-2100

Charlene K. Wisbey,	*	
	*	
Appellant,	*	
	*	Appeal from the United States
v.	*	District Court for the
	*	District of Nebraska.
City of Lincoln, Nebraska,	*	
	*	
Appellee.	*	

Submitted: March 10, 2010
Filed: July 6, 2010

Before SMITH, BENTON, and SHEPHERD, Circuit Judges.

SHEPHERD, Circuit Judge.

Charlene K. Wisbey appeals the district court's[1] dismissal on summary judgment of her lawsuit alleging violations of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213, and the Family Medical Leave Act (FMLA), 29 U.S.C. §§ 2601-2654. For the reasons explained below, we affirm.

[1]The Honorable David L. Piester, United States Magistrate Judge for the District of Nebraska, to whom the case was referred for final disposition by consent of the parties pursuant to 28 U.S.C. § 636(c).

I.

As this appeal is from a grant of summary judgment, we review the facts in the light most favorable to the nonmoving party. See Reed v. City of St. Charles, 561 F.3d 788, 790 (8th Cir. 2009). Beginning in 1979, Wisbey worked as an "Emergency Dispatcher II" for the City of Lincoln, Nebraska ("the City"). The position required Wisbey to "receiv[e] calls for emergency service and dispatch[] emergency service units on a regular basis." (J.A. 25.) Because of the potentially life-saving aspect of her position, the City expected Wisbey to "function accurately while working under considerable pressure" and to "think and act quickly and calmly in emergency situations." (Id. at 26.) Prior to 2007, Wisbey was never disciplined for missing work or for any inability to perform the tasks of her position. In fact, her performance evaluations reflected positive remarks.

From January through February 2007, Wisbey utilized a significant amount of sick leave due to an upper respiratory infection. Wisbey was not compensated for this leave because she had previously exhausted her allotted sick leave. The City provided Wisbey a written warning for taking excessive leave and recommended that she apply for intermittent leave under the FMLA.[2] Wisbey complied with the request and on February 27, 2007, she applied for intermittent FMLA leave on the basis of depression and anxiety, claiming on the application that she had a "serious health condition that render[ed] [her] unable to perform the essential functions of [her] job." (Id. at 28.) Attached to the FMLA application, Wisbey submitted a medical certification from her physician, Dr. Pothuloori, stating that Wisbey "suffer[ed] from recurring cycle depression, anxiety [which] interferes with her sleep, energy level, motivation, [and] concentration . . . ." (Id. at 29.) Dr. Pothuloori's certification also indicated that, although Wisbey was "able to perform any one or more of the essential functions of

[2]Wisbey had applied for, and received, FMLA leave on at least four prior occasions during her employment with the City.

[her] job," she would need to take time off work intermittently over the "next 6 months or longer." (Id.) Dr. Pothuloori left the blank labeled "anticipated return to work date" empty. (Id.)

Because the medical certification from Dr. Pothuloori indicated that Wisbey's concentration and motivation could be affected, Julie Righter, the Communications Manager of the City's emergency services, began to question whether Wisbey was still able to adequately perform her job as an emergency dispatcher. Righter shared her concerns with Don Taute, the City's personnel director, who suggested further evaluation of Wisbey. Righter asked William Kostner, a Risk Manager, to schedule an appointment for Wisbey to undergo a fitness-for-duty exam.

Kostner scheduled an appointment for Wisbey with Dr. Eli Chesen, a psychiatrist, requesting that Dr. Chesen perform a fitness-for-duty exam to determine, in his "professional medical opinion," if Wisbey was "qualified to continue her work" as an emergency dispatcher.[3] (Id. at 20.) To aid in his assessment, the City provided Dr. Chesen with information regarding the duties and job description of Wisbey's emergency dispatcher position. Her position required that she possess the ability to "act quickly and calmly in emergency situations" and the "[a]bility to obtain accurate and complete information from callers who may be frantic and incoherent due to emergency conditions." (Id. at 26.)

During her appointment with Dr. Chesen, Wisbey described her lengthy battle with depression and insomnia and stated that the emergency nature of her job exacerbated those conditions. For example, Wisbey described how she often

[3]Wisbey maintains that the City inquired as to whether Dr. Chesen believed that Wisbey suffered from Posttraumatic Stress Disorder (PTSD), however, the record does not support this contention. The only reference to PTSD in the record involves a statement in Dr. Chesen's report indicating that Wisbey "blames" her work issues on "alleged work-related Posttraumatic Stress Disorder." (J.A. 36.)

"witnessed" deadly events over the radio. After the examination, Dr. Chesen submitted a three-page report on his findings. The report stated that Wisbey suffered from "chronic relapsing depression (unipolar depression) which intermittently interferes with her ability to function at full capacity at work vis-á-vis tiredness" and that she was not "fit for duty as described in her job description, especially as related to tiredness, her ability to concentrate and her ongoing propensity to likely miss work." (Id. at 38.)

After receiving this report on March 28, 2007, the City expressed to Wisbey its concern that she could not perform her job, and placed Wisbey on administrative leave with pay. On the afternoon of May 30, 2007, Righter received an undated letter, authored by Dr. Pothuloori, which disagreed with Dr. Chesen's conclusion that Wisbey was unfit for duty. On May 31, 2007, Wisbey testified at a hearing before the City's Personnel Board that she stayed home from work when she felt tired, stating,

> [a]t times my depression arises, and it makes me very tired where I can sleep 20 straight hours. And that's where it interferes. Being tired at work was not ever a problem. But going on a string of six, seven straight days, I can get very tired due to the medication I'm on or due to the fact that I just get tired.

(Id. at 85-86.) Wisbey also stated that she would "never endanger anybody on the street by going [to work] tired or unprepared mentally." (Id. at 91.)

On April 3, 2007, the City met with Wisbey and provided her with a letter explaining that she was being terminated based on Dr. Chesen's determination that she was unfit for duty. The letter stated, "For your own safety it is important that you not continue in your present position." (Id. at 61.) The letter also encouraged Wisbey to "avail [herself] of City's long term disability benefits." (Id.) Wisbey filed suit in Nebraska state court, claiming that the City violated her rights under the ADA and the

FMLA. The City removed the case to federal court. Wisbey and the City filed cross motions for summary judgment.

The district court granted the City's motion for summary judgment and denied summary judgment to Wisbey, dismissing the case. As to Wisbey's ADA claim, the district court found that: (1) Wisbey failed to show that the City "perceived [her] as disabled as that term is defined under the ADA;" (2) no discriminatory evidence existed as to the City's decision to terminate Wisbey;" (3) Wisbey could not show that the City failed to reasonably accommodate her because her claim was premised on "a right to recovery solely on the basis of perceived disability;" and (4) even if the City was required to provide a reasonable accommodation, Wisbey failed to present any evidence of a feasible accommodation. (D. Ct. Order 22.) As for Wisbey's FMLA claim, the district court found that: (1) "in requesting indefinite, intermittent, self-determined leave," Wisbey did not show a right to leave protected by the FMLA; (2) Wisbey "failed to show that her employment termination was caused by the fact that she requested leave;" and (3) Wisbey was acceptably terminated based on medical information that she was unable to adequately perform her job and "not because she requested family medical leave." (Id. at 25-26.)

II.

On appeal, Wisbey argues that the district court erred in granting summary judgment to the City, because the requirement that she submit to a fitness-for-duty exam "was a violation of the ADA and the FMLA and that there is, at a minimum, a question of fact [as to] whether [she] could perform the essential functions of her job, but was terminated due to [the City's] perception of her as disabled." (Appellant's Br. 9.) "Summary judgment is proper if the evidence, viewed in the light most favorable to the nonmoving party, demonstrates that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." Thomas v. Union Pac. R.R., 308 F.3d 891, 893 (8th Cir. 2002). However, summary judgment should be used

"sparingly" in employment discrimination cases. Arnold v. Nursing & Rehab. Ctr. at Good Shepherd, 471 F.3d 843, 845-46 (8th Cir. 2006). Indeed, we are particularly deferential to the nonmovant in employment discrimination cases because the cases often lack direct evidence and are decided on mere inferences. See Land v. Washington County, 243 F.3d 1093, 1095 (8th Cir. 2001). Notwithstanding this point, summary judgment is proper here because Wisbey has failed to establish a factual dispute regarding any essential element of her case. See Arnold, 471 F.3d at 846.[4]

A. ADA

From Wisbey's convoluted argument,[5] we gather she challenges the district court's finding that no ADA violation occurred, insisting that genuine issues of material fact exist as to whether: (1) the City regarded her as disabled; (2) she could perform the essential functions of her job; and (3) the City failed to provide her a reasonable accommodation. We are unpersuaded by Wisbey's attempt to improperly stretch well-established ADA principles.

The purpose of the ADA is to eliminate discrimination against qualified employees with disabilities. 42 U.S.C. § 12101. As the employee, Wisbey bears the

[4]We recently discussed in detail the use of the summary judgment standard in employment discrimination and retaliation cases. See Torgerson v. City of Rochester, No. 09-1131, 2010 WL 2010996, at *7 (8th Cir. May 21, 2010) (citing cases).

[5]The City argues that Wisbey did not assign error in her opening brief as to her ADA claim and that she has waived the issue. See Fed. R. App. P. 28(a)(9)(A) (requiring an appellant's brief to contain the "contentions and the reasons for them, with citations to the authorities, and parts of the record on which the appellant relies."); see also United States v. Gonzales, 90 F.3d 1363, 1369-70 (8th Cir. 1996) (failure to assign error in a brief is considered abandonment of the issue). Although we find her argument somewhat disorganized, we conclude that Wisbey has sufficiently raised the issue for our consideration.

initial burden of establishing a prima facie case of discrimination under the ADA. Kosmicki v. Burlington N. & Santa Fe Ry., 545 F.3d 649, 651 (8th Cir. 2008). To do so, Wisbey must demonstrate that she: (1)"was disabled within the meaning of the ADA;" (2) "was qualified to perform the essential functions of [her] job;" and (3) "suffered an adverse employment action because of [her] disability." Id. As Wisbey has not shown that she was a disabled person within the meaning of the ADA, we refrain from discussing the other elements.

The ADA defines a disability, with respect to an individual, as: "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). A "major life activity" means "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(I). In her complaint, Wisbey concedes that she "does not have a disability or a substantially limiting impairment." (J.A. 6, ¶ 9.) However, Wisbey brings her ADA claim under the "regarded as" provision, arguing that she was "perceived by [the City] as having an impairment which substantially limits one or more major life activities" and that "[t]his perception caused [the City] to discharge [her]." (Id. at 7, ¶ 19.)

"In order to be regarded as disabled with respect to the major life activity of working, the employer must mistakenly believe that [an] *actual impairment* substantially limits the employee's ability to work." Chalfant v. Titan Distribution, Inc., 475 F.3d 982, 989 (8th Cir. 2007) (emphasis added). A substantial limitation on the major life activity of working means that an individual must be:

> significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3)(I).

Under the ADA, the "regarded as" provision was established to combat "archaic attitudes, erroneous perceptions, and myths" working to the disadvantage of the disabled or perceived disabled. Brunko v. Mercy Hosp., 260 F.3d 939, 942 (8th Cir. 2001) (quotations omitted). "If a restriction is based upon the recommendations of physicians, then it is not based upon myths or stereotypes about the disabled and does not establish a perception of disability." Breitkreutz v. Cambrex Charles City, Inc., 450 F.3d 780, 784 (8th Cir. 2006).

The record establishes that Wisbey was terminated because she was not "fit for duty," as reported by Dr. Chesen,[6] and not based on any myths or stereotypes about being disabled. See Brunko, 260 F.3d at 942 . In fact, Wisbey herself even admitted in her FMLA application that she was suffering a "serious health condition that render[ed] [her] unable to perform the essential functions of [her] job," (J.A. at 28), and she testified at the hearing before the City's Personnel Board that she did not go to work when she felt tired due to her depression. Therefore both Wisbey and her own doctor, determined that she would have to take leave on sporadic occasions based on her condition, providing support that the City did not mistakenly regard Wisbey as

[6]Wisbey also argues that the difference of opinion between Dr. Chesen and Dr. Pothuloori as to whether Wisbey was fit for duty creates a genuine issue of material fact. However, Wisbey did not in anyway dispute the contents of the fitness-for-duty report until the night before the Personnel Board hearing—weeks after the fitness-for-duty report was completed. The record reflects that, upon receipt of the undated letter disputing Dr. Chesen's findings, the City had already decided to terminate Wisbey because she was unfit for duty. We have held that a contrary medical report that is provided after a decision to terminate is irrelevant. See Kozisek v. County of Seward, 539 F.3d 930, 935 (8th Cir. 2008) ("That Kozisek was able, two months later, to manipulate a physician from the VA into providing a letter opining that outpatient treatment would be sufficient does not matter.").

having an impairment that substantially limited her ability to work, but that Wisbey was, in fact, unable to work due to her condition.

Wisbey further alleges that the fitness-for-duty exam did not constitute a business necessity because it required her to submit to an exam that is not permitted under the ADA. The ADA prohibits an employer from requiring a medical examination or inquiring into the disability status of an employee "unless such examination or inquiry is shown to be job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(4)(A). "To demonstrate compliance with § 12112(d)(4)(A), the employer bears the burden to show the asserted 'business necessity' is vital to the business and the request for a medical examination or inquiry is no broader or more intrusive than necessary." Thomas v. Corwin, 483 F.3d 516, 527 (8th Cir. 2007).

Moreover, employers are permitted "to use reasonable means to ascertain the cause of troubling behavior without exposing themselves to ADA claims," Cody v. CIGNA Healthcare of St. Louis, Inc., 139 F.3d 595, 599 (8th Cir. 1998), and fitness-for-duty exams are considered a reasonable means of making this determination, see Thomas, 483 F.3d at 528. In Thomas, we held that a fitness-for-duty exam was appropriate where a company "sought to ascertain whether [the employee] was fit to return to a position under the same working conditions that allegedly caused [her] stress and anxiety . . . [and] an extended three-week absence from work." Id. As here, the employer in Thomas directed the examining doctor "to determine whether any psychological problems interfered with [the employee's] ability to return to work." Id. We noted:

> "Courts will readily find a business necessity if an employer can demonstrate . . . a medical examination or inquiry is necessary to determine . . . whether the employee can perform job-related duties when the employer can identify legitimate, non-discriminatory reasons to doubt the employee's capacity to perform his or her duties (such as

> frequent absences . . .)," or "whether an employee's absence or request for an absence is due to legitimate medical reasons, when the employer has reason to suspect abuse of an attendance policy."

Id. at 527 (quoting Conroy v. N.Y. State Dep't of Corr. Servs., 333 F.3d 88, 97-98 (2d Cir. 2003)). In an analogous case, Gajda v. Manhattan & Bronx Surface Transit Operating Auth., 396 F.3d 187 (2d Cir. 2005) (per curiam), the Second Circuit held that an employee's statements on an FMLA application, which noted, "[m]y own serious health condition renders me unable to perform the functions of my position," and statements from the employee's doctor that "[the employee] will need intermittent leave at undetermined times for lifetime," id. at 189, provided the employer "'legitimate, non-discriminatory reasons to doubt the employee's capacity to perform his . . . duties.'" Id. (quoting Conroy, 333 F.3d at 98).

The nature of Wisbey's position supports the City's claim that the fitness-for-duty exam was a business necessity. As a dispatcher, Wisbey played an essential role in emergency functions and her position required her to be present to answer calls and alert at all times. In this position, people's lives are often at risk and a dispatcher's ability to focus and concentrate at all times is essential to adequate job performance. See, e.g., Krocka v. City of Chicago, 203 F.3d 507, 515 (7th Cir. 2000) ("It was entirely reasonable, and even responsible," for a city to require a fitness-for-duty exam for a police officer when the city learned that "he was experiencing difficulties with his mental health"); Watson v. City of Miami Beach, 177 F.3d 932, 935 (11th Cir. 1999) (holding that a fitness-for-duty exam of a police officer that exhibited abnormal mental conditions was acceptable and that the city was not "required to forgo a fitness for duty examination to wait until a perceived threat becomes real or questionable behavior results in injuries"). As the Seventh Circuit has noted:

> where inquiries into the psychiatric health of an employee are job related and reflect a concern with the safety of employees, the employer may, depending on the circumstances of the particular case, require specific

> medical information from the employee and may require that the employee undergo a physical examination designed to determine his ability to work.

Krocka, 203 F.3d at 515 (quotations and alterations omitted).

Although Wisbey relies on Albert v. Runyon, 6 F. Supp. 2d 57 (D. Mass. 1998), in support of her proposition that the fitness-for-duty exam violated the ADA, Albert actually supports the City's position. Unlike Wisbey, the claimant in Albert "deni[ed] that the ADA . . . [was] implicated . . . since she [was] not . . . under any disability and [was] not making any claim under the ADA." Id. at 62. Furthermore, the court noted that "an employer may have sufficient business justification to require an employee returning from FMLA leave to undergo examination only if she suffers from a continuing disability that the employer has reason to believe might affect her job performance." Id. at 69.

Here, the implication in the FMLA application that Wisbey suffered from conditions affecting her concentration and motivation reasonably gave the City pause with respect to whether Wisbey could continue as an emergency dispatcher. The fitness-for-duty exam provided the City with a legitimate means of resolving the matter by allowing the City "to ascertain whether [Wisbey] was fit to return to a position under the same working conditions that allegedly caused [her illnesses]." Thomas, 483 F.3d at 528. Accordingly, we conclude that the City did not violate the ADA by requiring Wisbey to obtain a fitness-for-duty exam.

B. FMLA

Although we find Wisbey's FMLA argument unorganized, she appears to assert that the fitness-for-duty exam was unwarranted under the FMLA because the City had

previously accepted Dr. Pothuloori's certification,[7] as submitted in Wisbey's FMLA application, that she could "perform any one of more of the essential functions of [her] job," although she would need to take time off work intermittently. (J.A. 29.) "Two types of claims exist under the FMLA: (1) 'interference' . . . claims, in which the employee alleges that an employer denied or interfered with his substantive rights under the FMLA and (2) 'retaliation' . . . claims, in which the employee alleges that the employer discriminated against him for exercising his FMLA rights." Stallings v. Hussmann Corp., 447 F.3d 1041, 1050 (8th Cir. 2006) (citing 29 U.S.C. § 2615(a)(1)-(2)). "The difference between the two claims is that the interference claim merely requires proof that the employer denied the employee his entitlements under the FMLA, while the retaliation claim requires proof of retaliatory intent." Id. at 1051. As the City notes in its brief, it is unclear which type of FMLA claim Wisbey raises. Regardless, we find summary judgment proper as to both types of claims.

1. Interference

An employer is prohibited from interfering with, restraining, or denying an employee's exercise of or attempted exercised of any FMLA right. 29 U.S.C. § 2615(a)(1). Interference includes "not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by a covered employer to avoid responsibilities under FMLA." 29 C.F.R. § 825.220(b). "In an interference claim, an employee must show only that he or she was entitled to the benefit denied." Stallings, 447 F.3d at 1050 (quotation omitted). In Stallings, we held that a retaliation claim, and not a interference claim, existed when the employer "granted every request [the employee] made to take FMLA leave," and the employee had failed to establish that the employer had "denied him a benefit to which he was entitled because he received all of the FMLA leave he requested." Id.

[7]Under the FMLA, "An employer may require that a request for leave . . . be supported by a certification issued by the health care provider of the eligible employee. . . ." 29 U.S.C. § 2613(a).

at 1051. Similarly here, Wisbey was never denied FMLA leave and, therefore, has not shown that she was entitled to any benefit that was denied. See id. at 1050-51.

Furthermore, contrary to Wisbey's claim, "the FMLA does not provide leave for leave's sake, but instead provides leave with an expectation an employee will return to work after the leave ends." Throneberry v. McGehee Desha County Hosp., 403 F.3d 972, 978 (8th Cir. 2005). Even had Wisbey's FMLA requests been denied,

> the FMLA does not provide an employee suffering from depression with a right to unscheduled and unpredictable, but cumulatively substantial, absences or a right to take unscheduled leave at a moment's notice for the rest of her career. On the contrary, such a situation implies that she is not qualified for a position where reliable attendance is a bona fide requirement . . . .

Spangler v. Fed. Home Loan Bank of Des Moines, 278 F.3d 847, 853 (8th Cir. 2002) (quotation omitted). Therefore, because Wisbey requested "intermittent leave" for "six months or longer" she did not have a right to FMLA leave. Without the right to FMLA leave, the City could not have interfered with Wisbey's rights under the FMLA.

2. Retaliation

An FMLA retaliation claim alleges that an employer discriminated against an employee for asserting his rights under the act. See Darby v. Bratch, 287 F.3d 673, 679 (8th Cir. 2002) (citing 29 U.S.C. § 2615(a)(2)). "Basing an adverse employment action on an employee's use of [FMLA] leave . . . is therefore actionable." Smith v. Allen Health Sys., Inc., 302 F.3d 827, 832 (8th Cir. 2002). To establish a retaliation claim, Wisbey must show: (1) "that she exercised rights afforded by the Act;" (2) "that she suffered an adverse employment action;" and (3) "that there was a causal connection between her exercise of rights and the adverse employment action." Id.

Wisbey did not establish a causal connection between her application for FMLA leave and her termination because the City relied on the fitness-for-duty exam, and not Wisbey's FMLA application, in its determination to terminate Wisbey's employment. The kind of causal connection required for a prima facie case is not "but for" causation, but rather a showing that an employer's "'retaliatory motive played a part in the adverse employment action,'" Kipp v. Missouri Highway and Transp. Comm'n, 280 F.3d 893, 897 (8th Cir. 2002) (quoting Sumner v. United States Postal Serv., 899 F.2d 203, 208-09 (2d Cir. 1990)). Here, the City lacked such a retaliatory motive. Furthermore, Wisbey has not presented any evidence of retaliation besides the fact that her termination occurred approximately one month after she submitted the FMLA application. "Generally, more than a temporal connection . . . is required to present a genuine factual issue on retaliation," and "mere coincidence of timing can rarely be sufficient to establish a submissible case of retaliatory discharge." Id. (quotations omitted). Therefore, we conclude that the City did not retaliate against Wisbey in violation of the FMLA.

IV.

Accordingly, we affirm the district court's judgment.
