STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2021-0129

Patricia Crowe v. Appalachian Stitching Company, LLC

RULE 7 APPEAL FROM SUMMARY JUDGMENT
ORDER OF THE GRAFTON COUNTY SUPERIOR COURT
(Justice Peter H. Bornstein)

BRIEF OF APPELLEE APPALACHIAN STITCHING COMPANY, LLC

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Gary M. Burt will present oral argument on behalf of Appalachian Stitching Company, LLC

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STATEMENT OF THE CASE AND STATEMENT OF FACTS

I. Crowe's Employment At Appalachian.

Patricia Crowe ("Crowe") commenced employment as an assembler at Appalachian Stitching Company, LLC ("Appalachian") on June 6, 2016. Appalachian's Brief Appendix ("App.") at 3, Affidavit of Jodie Wiggett ("Wiggett Aff."), ¶ 3. Crowe executed the signature page of the Appalachian Employee Policy Manual ("Employee Manual") two days before her employment began. App. at 6, Crowe's Executed Signature Page. Appalachian had determined that working as an assembler requires an individual to bend, lift, turn, and stand for extended periods. App. at 3, Wiggett Aff., ¶ 4; App. at 9, Deposition of Patricia Crowe ("Crowe Depo."), 11:12 – 12:10. The job description specifies that "[w]hile performing the duties of this job, the employee is regularly required to stand for prolonged periods of time." App. at 13, Job Description – SLG Assembler. The job description further provides that an employee "[m]ust have the ability to bend, lift and turn, freely." App. at 13, Job Description – SLG Assembler. The job description, dated October 17, 2006, was in effect for almost a decade before Crowe began working at Appalachian. App. at 12, Job Description – SLG Assembler.

II. The End Of Crowe's Employment At Appalachian.

Early on May 8, 2017, Crowe texted Wiggett to inform her that Crowe had been at the hospital with her husband the night before, and asked if she could be absent from work that day. App. at 3, Wiggett Aff., ¶ 5. Crowe failed to inform Wiggett that she had been diagnosed with sciatica, or that a doctor had placed restrictions on her activities that effectively prohibited her from performing the essential functions of her job. App. at 3, Wiggett Aff., ¶ 5. Ignorant about the specifics of Crowe's status, Wiggett granted Crowe's request to be absent from work, but asked that Crowe have the hospital send Appalachian a note regarding the visit. App. at 3, Wiggett Aff., ¶ 6. Wiggett's request for a doctor's note was made before Crowe ever returned to work. App. at 3, Wiggett Aff., ¶ 6. Crowe did not provide the requested note when she returned to work on May 9, 2017. App. at 4, Wiggett Aff., ¶ 7. Later that day, Appalachian's lead floor person, Melody Dumais ("Dumais"), informed Wiggett that Crowe had been diagnosed with sciatica and had been

instructed by a doctor not to lift, bend or stoop. App. at 4, Wiggett Aff., ¶ 8. After learning this information, Wiggett requested Crowe provide a doctor's note clearing her to work. App. at 4, Wiggett Aff., ¶ 9. Crowe promised to bring a doctor's note the next day. App. at 4, Wiggett Aff., ¶ 10.

On May 10, 2017 and May 11, 2017, Wiggett again requested that Crowe provide a doctor's note clearing her to work, but Crowe informed Wiggett that she did not have the note. App. at 4, Wiggett Aff., ¶¶ 11-12. On May 12, 2017, Crowe provided Wiggett with the Littleton Regional Healthcare Patient Discharge Instructions ("Discharge Instructions") that included a highlighted, capitalized instruction reading "NO LIFTING, BENDING OR STOOPING FOR 1 WEEK." App. at 4, Wiggett Aff., ¶ 13; App. at 15, Discharge Instructions. The Discharge Instructions, dated May 7, 2017, had been given to Crowe before Wiggett requested a doctor's note from Crowe on May 8, 2017 and before Crowe returned to work on May 9, 2017. App. at 15, Discharge Instructions. Crowe withheld the Discharge Instructions from Wiggett until May 12, 2017. App. at 4, Wiggett Aff., ¶ 13.

Having been provided the Discharge Instructions, Wiggett informed Crowe that a doctor would need to confirm that she could bend, lift, and turn before she returned to work. App. at 4, Wiggett Aff., ¶ 14. Later on May 12, 2017, Appalachian received a fax from Dr. Jeffrey Reisert ("Dr. Reisert") stating that he had seen Crowe that day for "non-work related back pain" and that he had "asked that she not work until she is seen back in follow up by me in one week." App. at 4, Wiggett Aff. ¶ 15; App. at 16, May 12, 2017 Letter from Jeffrey T. Reisert, D.O. Seven days later, Dr. Reisert faxed another letter to Appalachian stating that "Mrs. Crowe still cannot return to work due to NON-work related back problems. She remains under treatment." App. at 5, Wiggett Aff., ¶ 16; App. at 17, May 19, 2017 Letter from Jeffrey T. Reisert, D.O. Within his letter, Dr. Reisert mentioned that Crowe might be "eligible for FMLA," and requested forms be sent to him. App. at 17, May 19, 2017 Letter from Jeffrey T. Reisert, D.O. Wiggett advised the physician by letter that due to the small number of employees at Appalachian, it was not required to meet the requirements of the Family Medical Leave Act ("FMLA"). App. at 50, Deposition of Jodie Wiggett ("Wiggett Depo."), 38:9-20.

Appalachian was never provided with a doctor's note stating that Crowe was capable of returning to work as an assembler. App. at 5, Wiggett Aff., ¶ 17. As Crowe admitted, Appalachian had a right to rely upon her doctor's opinion regarding her ability to work. App. at 10, Crowe Depo., 35:3-7. Crowe never returned to work at Appalachian after May 12, 2017. App. at 5, Wiggett Aff., ¶ 18. Between May 20, 2017 and June 1, 2017, neither Crowe, nor her doctors spoke to Appalachian about her intent or ability to return to work. App. at 5, Wiggett Aff., ¶ 19. As Crowe worked five days per week, she missed more than three days of work during this period without any communication about her intent or ability to return to work. App. at 5, Wiggett Aff., ¶¶ 19-20. Crowe was an at-will employee at Appalachian. App. at 10, Crowe Depo., 34:21-22; App. at 29, Employee Manual, p. 12. The Employee Manual's provides that "[e]mployees who are absent from work for three consecutive days without calling in will be considered to have voluntarily quit." Crowe was determined to have voluntarily quit as she failed to provide information regarding her intent or ability to return to work before June 1, 2017. App. at 5, Wiggett Aff., ¶ 21.

III. The Trial Court's Order.

Crowe asserted in her Complaint claims for retaliation and disability discrimination under the Americans with Disabilities Act ("ADA") and N.H. Rev. Stat. Ann. § 354-A, et seq. (the "Law Against Discrimination"). App. at 30-43, Complaint and Jury Demand. These claims were premised on the theory that Appalachian discriminated and/or retaliated against Crowe by not making reasonable accommodations for her to continue working as an assembler. App. at 30-43, Complaint and Jury Demand.

On March 1, 2021, the trial court granted Appalachian's motion for summary judgment on Crowe's claims. *See infra*, March 1, 2021 order (the "Order"), p. 38. The trial court explained, "[t]he summary judgment record in this case establishes, as a matter of law, that the plaintiff is not a 'qualified individual' within the meaning of the ADA and that, therefore, [Appalachian] is entitled to summary judgment on the plaintiff's ADA discrimination claims." *Infra*, Order, p. 36. Because Crowe was not a qualified individual for the purposes of the ADA or the Law Against Discrimination, her retaliation claim under

the ADA and her retaliation and discrimination claims under the Law Against Discrimination also failed as a matter of law. *Infra*, Order, p. 37-38.

SUMMARY OF THE ARGUMENT

The Court should affirm the trial court's order as Crowe's discrimination and retaliation claims fail as a matter of law. Without a doctor's note confirming that she could return to work at Appalachian, Crowe was not a qualified individual under the ADA or the Law Against Discrimination. As Crowe was not a qualified individual, Appalachian was not required to engage in an interactive dialogue with Crowe, nor make reasonable accommodations for her.

Wiggett requested a doctor's note from Crowe on May 8, 2017, not knowing that Crowe had already been instructed not to work. Crowe returned to work on May 9, 2017, but withheld critical information about her health and work restrictions from Appalachian until May 12, 2017. When Crowe worked for part of May 9, 2017 and for a few days thereafter, she did so in direct contravention of the Discharge Instructions as lifting, bending, and stooping are essential functions of working as an assembler at Appalachian.

Crowe's failure to provide Appalachian with a doctor's note stating that she was capable of returning to work more than adequately supported Appalachian's decision not to allow her to continue work until she was medically cleared to do so. Crowe, however, was required to keep Appalachian apprised of her intentions to return to work which she failed to do. Consistent with the Employee Manual's provision regarding voluntary resignations, Crowe was determined to have voluntarily quit her position based on her failure to provide information regarding her intent or ability to return to work for more than three days.

Neither the ADA, nor the Law Against Discrimination required Appalachian to allow Crowe to work against her doctor's orders. Crowe was not a qualified individual for the purposes of the ADA or the Law Against Discrimination absent medical clearance to return to work. The trial court was therefore correct to grant Appalachian's motion for summary judgment.

ARGUMENT

I. The Trial Court Correctly Determined That Crowe Was Not A Qualified Individual Under The ADA Or The Law Against Discrimination And Thus Not Entitled To A Reasonable Accommodation.

The trial court correctly concluded that the undisputed material facts established that Crowe was not a qualified individual, as she failed to provide a doctor's note confirming that she was capable of returning to work as an assembler. Thus, the trial court correctly determined that Appalachian's was entitled to judgment as a matter of law. App. at 3, Wiggett Aff., ¶ 6.

Crowe withheld the Discharge Instructions from Wiggett until May 12, 2017. App. at 4, Wiggett Aff., ¶ 13. These Discharge Instructions state unequivocally that Crowe should refrain from "LIFTING, BENDING OR STOOPING FOR 1 WEEK." App. at 15, Discharge Instructions. Lifting, bending, and stooping are essential functions of working as an assembler at Appalachian and had been included in the assembler's job description for almost a decade before Crowe started working at Appalachian. App. at 13, Job Description – SLG Assembler.

That Crowe worked for part of the day on May 9, 2017 and a few days thereafter in direct contravention of the Discharge Instructions did not create a dispute of material fact regarding whether Crowe was a qualified individual under the ADA or the Law Against Discrimination. By working during this period, Crowe intentionally disregarded her doctor's instructions. "It is well-settled that an individual who has not been released to work by his or her doctor is not a qualified individual with a disability." *Kitchen v. Summers Continuous Care Center, LLC*, 552 F. Supp. 2d 589, 594 (S.D. W.Va. 2008). Once Crowe's deception was uncovered, Wiggett rightfully asked for a doctor's note stating that Crowe was capable of returning to work as an assembler. App. at 5, Wiggett Aff., ¶ 17. Crowe was never able to satisfy this request. The only doctor's notes that Crowe provided to Appalachian confirmed that she could not work. App. at 16, May 12, 2019 Letter from Jeffrey T. Reisert, D.O.; App. at 17, May 19, 2017 Letter from Jeffrey T. Reisert, D.O. As Crowe never provided Appalachian with a doctor's note confirming that

she could return to work as an assembler, Crowe was not a qualified individual for the purposes of the ADA or the Law Against Discrimination. The trial court's order granting Appalachian's motion for summary judgment should therefore be affirmed.

A. Crowe's ADA Discrimination Claim Fails As Her Doctor Never Cleared Her To Return To Work, A Necessary Prerequisite To Trigger The Right To A Reasonable Accommodation.

The ADA provides that "[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). The ADA specifies that:

> "discriminate against a qualified individual on the basis of disability" includes…
>
> (5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or
>
> (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

42 U.S.C. § 12112(b). To state a viable ADA discrimination claim, a person must be a qualified individual.

Crowe never provided Appalachian with a doctor's note stating that she could perform the essential functions of an assembler. App. at 5, Wiggett Aff., ¶ 17. The only documents that Crowe provided to Appalachian confirmed that she could not return to work. The Discharge Instructions included a highlighted, capitalized instruction reading "NO LIFTING, BENDING OR STOOPING FOR 1 WEEK." App. at 15, Discharge Instructions. Lifting, bending, and stooping are necessary for working as an assembler at

Appalachian. App. at 13, Job Description – SLG Assembler. Dr. Reisert's May 12, 2017 letter stated that he had seen Crowe that day for "non-work related back pain" and that he had "asked that she not work until she is seen back in follow up by me in one week." App. at 16, May 12, 2017 Letter from Jeffrey T. Reisert, D.O. Dr. Reisert's May 19, 2017 letter similarly provided that "Mrs. Crowe still cannot return to work due to NON-work related back problems. She remains under treatment." App. at 17, May 19, 2017 Letter from Jeffrey T. Reisert, D.O.

"In order to establish a prima facie case of ADA employment discrimination, a plaintiff must show: (1) that she was 'disabled' within the meaning of the ADA; (2) that she was able to perform the essential functions of her job with or without accommodation; and (3) that she was discharged or adversely affected, in whole or in part, because of her disability." *Duhy v. Concord Gen. Mut. Ins. Co.*, 2009 WL 1650024, at *8 (D.N.H. June 10, 2009) (internal quotation omitted). "An employee who has not been released by her doctor to return to work is not qualified to perform the essential functions of the job." *Pate v. Baker Tanks Gulf South, Inc.*, 34 F. Supp. 2d 411, 416 (W.D. La. 1999); *see also Kitchen*, 552 F. Supp. 2d at 594. Numerous courts have held that an individual who has not been medically cleared to return to work is not a qualified individual under the ADA. *See, e.g.*, *Horn v. Southern Union Gas Co.*, 2009 WL 462697, at *5 (D.R.I. Feb. 20, 2009) (agreeing that the plaintiff was not a qualified individual in part because the plaintiff's "doctors never released her to come back to work prior to her termination"); *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1047 (6th Cir. 1998) ("There is no dispute that Plaintiff was a disabled person. Nevertheless, because she was not released by her doctor to return to work, she has not met the second requirement that she be qualified to perform the essential functions of the job."); *E.E.O.C. v. Methodist Hospitals of Dallas*, 218 F. Supp. 3d 495, 501 (N.D. Tex. 2016) ("If an employee is placed off work due to a medical condition, the employee may need to provide a release informing the employer when they can return to work. … . Courts have regularly held that an employee who fails to provide a release is not a qualified individual under the ADA.").

Appalachian had an absolute right to rely upon Crowe's physician's opinion regarding her ability to work. App. at 10, Crowe Depo., 35:3-7. Based on the documents provided to Appalachian, the medical opinion consistently indicated that Crowe could not return to work. An assembler at Appalachian is required to "stand for prolonged periods of time" and "bend, lift and turn, freely." App. at 13, Job Description – SLG Assembler. Crowe never produced a doctor's note stating that she could perform these functions, but in fact exactly the opposite. Her doctor continuously held her out of work. "[U]nder the ADA, an employer is not required to accommodate an employee by exempting her from having to discharge an essential job function." *Lang v. Wal-Mart Stores East, L.P.*, 813 F.3d 447, 456 (1st Cir. 2016).

Without a doctor's note confirming Crowe's ability to work, Appalachian was not required to engage Crowe in an interactive dialogue, as that requirement is triggered by an employee's ability to be able to carry out the essential functions of the job. *See, e.g.*, *Williamson v. Bon Secours Richmond Health Sys., Inc.*, 34 F. Supp. 3d 607, 613 (E.D. Va. 2014) ("An employer may ask for written documentation from a doctor, psychologist ... or other professional with knowledge of the person's functional limitations."); *Lopez v. Hollisco Owners' Corp.*, 147 F. Supp. 3d 71, 78 (E.D.N.Y. 2015) ("The record demonstrates that plaintiff's firing was not due to his perceived Hepatitis status. He failed to return to work with a doctor's note. Plaintiff chose not to provide the requested doctor's note because, he testified, he felt that he did not have to. … . By deciding he did not have to provide the requested doctor's note, plaintiff effectively abandoned his job. An employee's failure to provide medical clearance to return to work is a legitimate, non-discriminatory reason for an adverse job action." (internal citation and quotation omitted)). "If an employee is placed off work due to a medical condition, the employee may need to provide a release informing the employer when they can return to work. … . Courts have regularly held that an employee who fails to provide a release is not a qualified individual under the ADA." *E.E.O.C. v. Methodist Hosps. of Dallas*, 218 F. Supp. 3d at 501.

Appalachian had no obligation to initiate an interactive dialogue with Crowe, as Crowe was not a qualified individual. *See* 2 Americans with Disabilities Practice &

Compliance Manual § 8:242 ("To determine the appropriate reasonable accommodation it may be necessary for the contractor to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation."). "[A]n employer is not required to engage in the interactive process where… the employee was not a qualified individual." *Gibson v. Milwaukee Cty.*, 95 F. Supp. 3d 1061, 1068 n. 3 (E.D. Wis. 2015); *see also Mason v. Avaya Commc'ns, Inc.*, 357 F.3d 1114, 1124 n. 4 (10th Cir. 2004) ("Avaya… was not required to engage in the interactive process because Mason was not a qualified individual with a disability under the ADA."); *Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169, 194 n. 20 (3d Cir. 2009) (collecting cases holding that a failure to engage in interactive process is irrelevant if the employee is not a qualified individual). Crowe's failure to provide Appalachian with a doctor's note confirming that she could work undermines her claim that Appalachian was required to engage in an interactive dialogue with her.

Crowe claims that she was told she would need to have no restrictions before being allowed to return to work. *See* Crowe Brief, p. 20. This assertion mischaracterizes Wiggett's conversation with Crowe. Wiggett did not tell Crowe that she could return to work only if she had no restrictions, but rather asked Crowe to provide a doctor's note clearing her to work. App. at 4, Wiggett Aff., ¶ 9. Wiggett testified:

> Q. Did you tell Ms. Dumais -- sorry, let me strike that. Did you tell Mrs. Crowe that she could not return unless her restrictions were lifted?
>
> A. I told her -- correct. Until she could bend, lift, and stoop.

App. at 48, Wiggett Depo., 31:13-17. Wiggett did not impose a "no restrictions" requirement on Crowe. She specified that Crowe would need a doctor to clear her to lift, bend, and stoop before Crowe returned to work. App. at 13, Job Description – SLG Assembler, p. 2; *see also Tarbell v. Rocky's Ace Hardware*, 297 F. Supp. 3d 248, 259-60 (D. Mass. 2018) (explaining that an employer "was entitled to rely on the medical information [the employee] had provided" and the employee "failed to meet his burden of

providing evidence that he was capable of performing the essential functions" of the position).

Crowe's failure to provide the necessary note, and her failure to keep Appalachian informed of her intentions for more than three days, was a permissible reason for Appalachian to conclude that Crowe voluntarily quit. The Employee Manual provides that "[e]mployees who are absent from work for three consecutive days without calling in will be considered to have voluntarily quit." App. at 29, Employee Manual, p. 12. Appalachian determined that Crowe voluntarily quit her position based on her failure to provide any information regarding her intent or ability to return to work for more than three days before June 1, 2017. App. at 5, Wiggett Aff., ¶ 21. This determination was not discriminatory and did not violate the ADA.

B. Crowe's Claim Under The Law Against Discrimination Required That She Be A Qualified Individual, And As She Had Not Been Cleared To Return To Work By Her Physician, The Court Correctly Determined That Her Discrimination Claim Under The Law Against Discrimination Cannot Succeed.

As Crowe was not a qualified individual, her discrimination claim arising under the Law Against Discrimination also cannot succeed. N.H. Rev. Stat. Ann. § 354-A:7 provides that:

> It shall be an unlawful discriminatory practice:
>
> ….
>
> VII. (a) For any employer not to make reasonable accommodations for the known physical or mental limitations of **a qualified individual** with a disability who is an applicant or employee, unless such employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the employer.
>
> (b) For any employer to deny employment opportunities, compensation, terms, conditions, or privileges of employment to a job applicant or employee who is a qualified individual with a disability, if such denial is based on the need of such

> employer to make reasonable accommodation to the physical or mental impairments of the applicant or employee.

N.H. Rev. Stat. Ann. § 354-A:7. Crowe's failure to provide Appalachian with a doctor's note clearing her to return to work is fatal to this claim.

This Court has found federal law "instructive" with respect to its interpretation of the Law Against Discrimination. *See Madeja v. MPB Corp.*, 149 N.H. 371, 379 (2003). The United States District Court for the District of New Hampshire has similarly relied on case law interpreting the ADA to analyze claims arising under the Law Against Discrimination. *See Lang v. Wal-Mart Stores East, L.P.*, 2015 WL 898026, at *6 (D.N.H. Mar. 3, 2015) ("Per the guidance of the New Hampshire Supreme Court, this court relies on cases construing Title VII of the ADA to assess [the plaintiff's] NHLAD claim."). The ADA and the Law Against Discrimination each use the term "qualified individual" in their statutes prohibiting disability discrimination. *See Duhy*, 2009 WL 1650024, at *7 (noting that the Law Against Discrimination uses similar language as the ADA with respect to "qualified individuals").

Crowe is not a qualified individual under the Law Against Discrimination for the same reason that she is not a qualified individual under the ADA: she never provided Appalachian with a doctor's note confirming her ability to return to work. Appalachian had a right to rely upon her doctor's opinion regarding her ability to work. App. at 10, Crowe Depo., 35:3-7. The Law Against Discrimination did not require Appalachian to make reasonable accommodations for Crowe when Crowe had not been cleared to return to work by a doctor.

C. As Crowe Did Not Engage In An Activity Protected By The ADA, Crowe's Retaliation Claim Fails.

Crowe cannot succeed on her retaliation claim arising under the ADA as she did not engage in an activity protected by the act. 42 U.S.C. § 12203 provides that:

> **(a) Retaliation**
>
> No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful

> by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.
>
> **(b) Interference, coercion, or intimidation**
>
> It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

42 U.S.C. § 12203. In the Complaint, Crowe alleges:

> 73. Mrs. Crowe engaged in protected activity under the ADA, including, but not limited to, by requesting reasonable accommodations for a disability which were intended to allow Mrs. Crowe to perform the essential functions of her job.
>
> 74. Appalachian discriminated against and/or retaliated against Mrs. Crowe for requesting disability-related reasonable accommodations, by subjecting Mrs. Crowe to adverse actions, including, but not limited to, subjecting Mrs. Crowe to a harassing and hostile work environment and/or terminating Mrs. Crowe's employment.

App. at 40, Complaint, ¶¶ 73-74. "To establish a prima facie case of unlawful retaliation, [the plaintiff] must establish (1) that he engaged in statutorily protected activity; (2) that [the defendant] took an adverse employment action against him; and (3) that a causal connection existed between [the defendant's] action and his activity." *Bellerose v. SAU No. 39*, 2014 WL 7384105, at *6 (D.N.H. Dec. 29, 2014).

Crowe appears to allege that Appalachian retaliated against her for requesting reasonable accommodations to work as an assembler. Under the ADA, however, an employer is required to make reasonable accommodations only "to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee." 42 U.S.C. § 12112(b). Appalachian could not have retaliated against Crowe

for requesting a reasonable accommodation if requesting a reasonable accommodation was not an activity that was protected under the ADA.

In *Horn v. Southern Union Gas Co.*, the United States District Court for the District of Rhode Island granted an employer's motion for summary judgment on a plaintiff's ADA retaliation claim under circumstances similar to those in this matter. *See* 2009 WL 462697, at *11 (D.R.I. Feb. 20, 2009). There, the plaintiff alleged that the employer retaliated against her by terminating her less than two weeks after she requested reasonable accommodations to perform her job. *See id.* at *10. The employer advised the plaintiff, *inter alia*, that, "in accordance with its written policy," unless the plaintiff "notified the Company that she had been released to return to work and that her return to work was imminent, her employment would terminate automatically without further notice on December 7, 2005." *Id.* at *10. As the Court recognized, there was "strong evidence in the record that Plaintiff's termination would have occurred irrespective of her request for accommodation unless she responded that she had been released to return to work and that her return was imminent. The Court has already noted that Plaintiff's doctors had not released her to return to work." *Id.* Ultimately, the Court concluded that the plaintiff's ADA retaliation claim failed, in part because she never provided the employer with a note from her doctor clearing her to return to work. *See id.* at *11.

The trial court was correct to reach the same result in this matter. Crowe never provided Appalachian with a doctor's note confirming that she could return to work as an assembler. App. at 5, Wiggett Aff., ¶ 17. The ADA requires an employer to make reasonable accommodations only for qualified individuals. *See* 42 U.S.C. § 12112(b). As Crowe was never cleared to return to work, she was not a qualified individual under the ADA. *See Pagel v. Premier Mfg. Support Servs., Inc.*, 2005 WL 1785178, at *8 (M.D. Tenn. July 21, 2005) ("An employee who suffers an injury or illness and is not medically released to return to work is not 'qualified' under the ADA."). Accordingly, Crowe's request for an accommodation was not protected under the ADA, and Appalachian did not retaliate against her by determining that she had voluntarily quit after missing more than three days of work. App. at 5, Wiggett Aff., ¶ 21.

D. As Crowe Was Not A Qualified Individual, Appalachian Was Not Required To Make Reasonable Accommodations.

Crowe's failure to provide Appalachian with a doctor's note confirming that she could return to work is also fatal to her retaliation claim under the Law Against Discrimination. The Law Against Discrimination provides that "[i]t shall be an unlawful discriminatory practice for any person engaged in any activity to which this chapter applies to discharge, expel, or otherwise retaliate or discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding under this chapter." N.H. Rev. Stat. Ann. § 354-A:19. "[T]o establish a prima facie case of retaliation under… N.H. Rev. Stat. Ann. § 354–A, the plaintiff must show that (1) she engaged in a statutorily-protected activity; (2) she suffered an adverse employment action; and (3) the protected activity and the adverse employment action were causally connected." *Dennis v. Osram Sylvania, Inc.*, 549 F.3d 851, 856-57 (1st Cir. 2008) (internal citation omitted).

As Crowe did not provide Appalachian with a doctor's note confirming that she could perform the essential functions of her job, Appalachian was not required to make accommodations for her. *See Lang*, 813 F.3d at 456. In her Complaint, Crowe alleges that she "engaged in protected activity under RSA 354-A, including, but not limited to, requesting reasonable accommodations for a disability which were intended to allow Mrs. Crowe to perform the essential functions of her job." App. at 41, Complaint, ¶ 80. The Law Against Discrimination makes it discriminatory "[f]or any employer not to make reasonable accommodations for the known physical or mental limitations of a qualified individual with a disability who is an applicant or employee." N.H. Rev. Stat. Ann. § 354-A:7. As Crowe was not cleared by a doctor to return to work, she was not a qualified individual for the purposes of the Law Against Discrimination. Appalachian had no obligation to accommodate her, and Crowe did not engage in a statutorily-protected activity by requesting accommodations to work against her doctor's orders. Crowe requested something that neither the ADA, nor the Law Against Discrimination required.

II. The Essential Functions Of Its Assembler Position Are A Matter For The Employer's Determination.

The trial court correctly recognized that Appalachian, not Crowe, determines the essential functions of the assembler position. "The employer, not a court, determines what functions are essential, and we will not second-guess that decision." *Lloyd v. Swifty Transp., Inc.*, 552 F.3d 594, 601 (7th Cir. 2009); *see also Weigert v. Georgetown Univ.*, 120 F. Supp. 2d 1, 14 (D.D.C. 2000) ("Courts defer to the employer's judgment as to what functions of a job are essential." (internal quotation omitted)). "The ADA requires courts to consider the employer's business judgment when determining the essential functions of a job." *Cantrell v. Yates Servs., LLC*, 205 F. Supp. 3d 928, 934 (M.D. Tenn. 2016). The ADA provides that "[f]or the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job." 42 U.S.C. § 12111. An employer's determination of the essential functions of a job are "entitled to substantial weight in the calculus." *Rogers v. Norman W. Fries, Inc.*, 418 F. Supp. 3d 1295, 1304 (S.D. Ga. 2019). The essential functions "inquiry is not intended to second guess the employer or to require him to lower company standards. … . Provided that any necessary job specification is job-related, uniformly enforced, and consistent with business necessity, the employer has a right to establish what a job is and what is required to perform it." *Davidson v. Am. Online, Inc.*, 337 F.3d 1179, 1191 (10th Cir. 2003).

Appalachian's determination of the essential functions of the assembler position, its written description of the requirements to work as an assembler, and how assemblers work at Appalachian in practice all demonstrate that lifting, bending, and stooping are essential functions of the position. With respect to Appalachian's determination of the essential functions of the position, Wiggett stated unequivocally that "[w]orking as an assembler for Appalachian requires an individual to bend, lift, turn, and stand for extended periods." App. at 3, Wiggett Aff., ¶ 4. Scott Manning ("Manning"), Appalachian's manager/member, similarly testified that all positions at Appalachian required employees

to lift, bend, and stoop. App. at 58, Deposition of Scott Manning ("Manning Depo."), 34:3-11. Regarding how assemblers work in practice, Appalachian's lead floor person, Dumais, testified:

> Q. Did you have an understanding that in order to perform the job of an assembler at Appalachian Stitching, you had to have the ability, not only to stand and sit for extended periods of times, but also to bend, lift, and turn freely?
>
> A. I did.
>
> Q. And were those the requirements you understood that were necessary in order to perform the job of assembler at Appalachian Stitching?
>
> A. Yes, they are.

App. at 65, Deposition of Melody Dumais ("Dumais Depo."), 57:4-13. This testimony confirms the accuracy of Appalachian's job description for an assembler, which specifies that an employee "[m]ust have the ability to bend, lift and turn, freely." App. at 13, Job Description – SLG Assembler. This description was drafted on October 17, 2006, almost ten years before Crowe began working as an assembler at Appalachian. *Compare* App. at 12, Job Description – SLG*, with* App. at 3, Wiggett Aff., ¶ 3.

Crowe cannot create a dispute of material fact by claiming that she was not required to bend, or stoop while working as an assembler at Appalachian. *See* Crowe Brief, p. 18-19. An employee's "specific personal experience is of no consequence in the essential functions equation. Instead, it is the written job description, the employer's judgment, and the experience and expectations of all [similar employees] generally which establish the essential functions of the job." *Dropinski v. Douglas Cty., Neb.*, 298 F.3d 704, 709 (8th Cir. 2002). "It is not the employee… who is entitled to decide what a job's essential functions should be. Rather, it is the employer's prerogative to define a job's duties, and the employer has substantial leeway in defining them." *Cruz v. McAllister Bros.*, 52 F. Supp. 2d 269, 284 (D.P.R. 1999). Appalachian's determination of an assembler's essential

functions, the written description of the requirements for an assembler, and how assemblers work at Appalachian all support that lifting, bending, and stooping are essential functions of the position. *See Minnihan v. Mediacom Commc'ns Corp.*, 987 F. Supp. 2d 918, 934 (S.D. Iowa 2013) (explaining that a plaintiff's specific personal experience is irrelevant for determining the essential functions of a position).

Crowe's further claim that the jury determines the essential functions of a position is simply erroneous. *See* Crowe Brief, p. 16. Crowe is conflating the issue of what are the essential functions of the job with who determines whether those essential functions can be performed. The employer determines a position's essential functions. If a doctor clears an employee to work, the jury generally then decides whether an employee can perform a position's essential functions. *See Tobin v. Liberty Mut. Ins. Co.*, 553 F.3d 121, 136 (1st Cir. 2009) (noting that the jury made findings regarding whether the plaintiff could perform the essential functions of the position); *Sensing v. Outback Steakhouse of Florida, LLC*, 575 F.3d 145, 156-57 (1st Cir. 2009) (indicating that the plaintiff had raised a genuine issue regarding whether she could perform the essential functions of the position). Crowe blurs the distinction between what a position's essential functions are and a particular employee's ability to perform them. She cites no authority supporting that an employer must allow an employee to work against her doctor's orders. Appalachian was not required to offer Crowe a reasonable accommodation as "an employer is obviously not obligated to offer an 'accommodation' to an employee that is contrary to medical advice and would place the employee at risk." *Jones v. Walgreen Co.*, 765 F. Supp. 2d 100, 108 n. 3 (D. Mass. 2011).

III. Crowe Waived Her Claim That Her Physician's Inquiry About Paperwork For FMLA Qualifies As A Request For A Reasonable Accommodation Under The ADA.

This Court "will not consider issues raised on appeal that were not presented in the lower court." *Daboul v. Town of Hampton*, 124 N.H. 307, 309 (1983) (citing *Carburs, Inc. v. A&S Office Concepts, Inc.*, 122 N.H. 421, 423 (1982)). "The rationale behind the rule is that trial forums should have an opportunity to rule on issues and to correct errors before

they are presented to the appellate court." *Mortgage Specialists v. Davey*, 153 N.H. 764, 786 (2006) (internal quotation and brackets omitted). Crowe argues that Dr. Reisert's letter inquiring about FMLA forms was a request for a reasonable accommodation under the ADA. *See* Crowe Brief, p. 28-29. Crowe never adequately raised this argument before the trial court. Crowe's only reference to this argument, passingly mentioned in her opposition to Appalachian's motion for summary judgment, was that Appalachian "denied Mrs. Crowe this reasonable accommodation of FMLA leave, due to the fact that there were not 50 employees working within 75 miles of the Defendant." App. at 72, Crowe's Memorandum of Law, p. 6. In her statement of additional material facts, Crowe claimed that she "continued to follow up with [Appalachian] through her doctor, with her doctor sending a note requesting extended leave for [Crowe] as a reasonable accommodation." App. at 89, Crowe's Statement of Additional Material Facts, ¶ 25. Neither Crowe's memorandum of law, nor her statement of additional material facts explained how or why the note from her treating physician qualified as a request for accommodation.

A "[p]assing reference, otherwise ignored, does not preserve an issue on appeal." *Boston & Maine Corp. v. Sprague Energy Corp.*, 151 N.H. 513, 518 (2004). Crowe never explained how Dr. Reisert's letter could qualify as a request for a reasonable accommodation under the ADA and never cited any authority supporting that a doctor's inquiry about FMLA forms qualifies as a request for a reasonable accommodation. *See In re Est. of Leonard*, 128 N.H. 407, 409 (1986). "It is the burden of the appealing party… to demonstrate that they raised their issues before the trial court." *New Hampshire Right to Life v. Dir., New Hampshire Charitable Trusts Unit*, 169 N.H. 95, 125-26 (2016). "[T]rial courts should have an opportunity to rule upon issues and to correct errors before they are presented to the appellate court." *Mellin v. N. Sec. Ins. Co., Inc.*, 167 N.H. 544, 556 (2015). As Crowe never argued in her opposition to Appalachian's motion for summary judgment, nor moved to reconsider the trial court's order on the basis that it overlooked or misapprehended the effect of Dr. Reisert's letter, the trial court never had an opportunity to rule on it.

Requiring a party to raise all of their possible arguments before the trial court "is designed to discourage parties unhappy with the trial result to comb the record, endeavoring to find some alleged error never addressed by the trial judge that could be used to set aside the verdict." *LaMontagne Builders, Inc. v. Bowman Brook Purchase Grp.*, 150 N.H. 270, 274 (2003) (internal quotation omitted). A vague reference to an argument does not preserve it for appellate review, and this Court should not consider it.

IV. Crowe's Physician's Inquiry About Paperwork For FMLA Was Not A Request For A Reasonable Accommodation Under The ADA.

Dr. Reisert did not request a reasonable accommodation on Crowe's behalf in his May 19, 2017 letter. In that letter, Dr. Reisert noted that he believed that Crowe was "eligible for FMLA." App. at 17, May 19, 2017 Letter from Jeffrey T. Reisert, D.O. He then requested FMLA forms from Appalachian. App. at 17, May 19, 2017 Letter from Jeffrey T. Reisert, D.O. Dr. Reisert did not request that Crowe be placed on leave. App. at 17, May 19, 2017 Letter from Jeffrey T. Reisert, D.O. His inquiry about FMLA is not a request for a reasonable accommodation under the ADA. *See Posteraro v. RBS Citizens, N.A.*, 159 F. Supp. 3d 277, 290 (D.N.H. 2016) (finding "that the request for a 'peaceful calm environment' is too vague to be considered a request under the ADA or state law"); *see also* 1 Disability Discrimination Workplace § 17:5 (noting that "a request for FMLA leave is not a request for a reasonable accommodation under the ADA"); *Geuss v. Pfizer, Inc.*, 971 F. Supp. 164, 173 n.13 (E.D. Pa. 1996) ("The ADA does not require an employer to guess at the actions it should take to provide a reasonable accommodation to an employee. It is not enough for the employee to make vague suggestions or references in this regard. Rather, it's the employee's responsibility to come forward and tell the employer specifically what he or she needs to be able to perform the job.").

Through his May 19, 2017 letter, Dr. Reisert mentioned the possibility of FMLA and asked Appalachian to send him any necessary paperwork. An inquiry about the availability of FMLA leave is not a request for a reasonable accommodation under the ADA. *See Waggel v. George Washington Univ.*, 2018 WL 5886653, at *5 (D.D.C. Nov. 9, 2018) (explaining that a question about available medical leave "falls well short of a

request for reasonable accommodation of a disability; otherwise, any inquiry about medical leave, presumably under the FMLA, could automatically be deemed a request for accommodation under the ADA."). Accordingly, Dr. Reisert's May 19, 2017 letter was not a request for a reasonable accommodation. *See Flemmings v. Howard Univ.*, 198 F.3d 857, 861 (D.C. Cir. 1999) ("An underlying assumption of any reasonable accommodation claim is that the plaintiff-employee has requested an accommodation which the defendant-employer has denied.").

Crowe's conduct upon learning of her termination further confirms that she never requested leave as a reasonable accommodation. Upon learning that she had been terminated, Crowe did not inform Wiggett that she could return to her job in the near future, indicate that she had a doctor's appointment scheduled to evaluate her sciatica or request additional time for her condition to improve. App. at 51-52, Wiggett Depo. 45:19 – 46:19. Instead, Crowe told Wiggett to throw her belongings out. App. at 51-52, Wiggett Depo. 45:19 – 46:19. This response was consistent with Appalachian's understanding that Crowe had voluntarily quit her position. App. at 5, Wiggett Aff., ¶ 21.

Crowe's argument would fail even if Dr. Reisert had requested FMLA leave on Crowe's behalf as "a request for FMLA leave is not a request for a reasonable accommodation under the ADA." *Acker v. Gen. Motors, L.L.C.*, 853 F.3d 784, 791 (5th Cir. 2017). "The ADA and the FMLA have divergent aims, operate in different ways, and offer disparate relief." *Navarro v. Pfizer Corp.*, 261 F.3d 90, 101 (1st Cir. 2001). "FMLA leave is not a reasonable accommodation under the ADA; rather it is a right enforceable under a separate statutory provision." *Harville v. Tex. A&M Univ.*, 833 F. Supp. 2d 645, 661 (S.D. Tex. 2011) (citing *Trevino v. United Parcel Serv.*, 2009 WL 3423039, at *12 (N.D. Tex. Oct. 23, 2009)). One court has indicated that "a request for FMLA leave may qualify, under certain circumstances, as a request for a reasonable accommodation under the ADA," *Capps v. Mondelez Glob., LLC*, 847 F.3d 144, 156-57 (3d Cir. 2017), but the authority cited for this proposition, 29 C.F.R. § 825.702, notes that "the leave provisions of the [FMLA] are wholly distinct from the reasonable accommodation obligations of employers covered under the [ADA]" and specifies that its examples of how the two acts

interact relate to "a qualified individual with a disability." 29 C.F.R. § 825.702. As Crowe was never a qualified individual for the purposes of the ADA, the circumstances where a request for FMLA leave could qualify as a request for a reasonable accommodation are not present. Appalachian had no obligation to grant Crowe a reasonable accommodation. As the trial court recognized, "[u]nder the ADA… an employer is required to participate in an interactive accommodation process and to make reasonable accommodations only for 'an otherwise qualified individual.'" *Infra*, Order, p. 37.

V. Crowe's Attempt To Create A Dispute Of Material Fact Through An Affidavit That Recites Hearsay And Legal Conclusions Was Properly Rejected By The Trial Court.

This Court should ignore much of Crowe's affidavit as it contains hearsay and legal conclusions. In her affidavit, Crowe describes statements that she made to her doctor regarding what Wiggett allegedly told her, Crowe App. at 101, Crowe Aff., ¶ 20, and statements by her doctor regarding her employment status. Crowe App. at 101, Crowe Aff., ¶ 24. Crowe also claims that "it was my doctor's opinion that I could work so long as I was granted minimal reasonable accommodations that were not an undue burden on the Defendant." Crowe App. at 100, Crowe Aff., ¶ 15. This opinion, contrary to the notes supplied by her physicians, was never included in any record provided to Appalachian and could only have been learned by Crowe through a hearsay statement.

"[H]earsay evidence cannot be considered on summary judgment." *Davila v. Corporación De P.R. Para La Difusión Pública*, 498 F.3d 9, 17 (1st Cir. 2007). Consistent with this rule, in *Rand v. Aetna Life & Cas. Co.*, this Court found that "the alleged testimony of Zeller offered in Attorney Richardson's affidavit was inadmissible hearsay, and was therefore improper for an affidavit offered in opposition to a summary judgment motion." 132 N.H. 768, 772 (1990). The United States District Court for the District of New Hampshire has also ruled that hearsay cannot be considered when analyzing a summary judgment motion. *See, e.g.*, *Foley v. Town of Lee*, 871 F. Supp. 2d 39, 46-47 (D.N.H. 2012); *Stone and Michaud Ins., Inc. v. Bank Five for Savings*, 765 F. Supp. 1065,

1071 (D.N.H. 1992). As Crowe's statements to and by her doctor are inadmissible hearsay, the Court should not consider them.

The Court also should not consider the numerous legal conclusions in Crowe's affidavit. "[A]ffidavits should set forth evidentiary, and not ultimate, facts and should set forth the facts with particularity, mere general averments being insufficient." 49 C.J.S. Judgments § 332, at 404–05 (2009). "Affidavits containing statements of legal conclusions" are insufficient to reverse the trial court's granting of a party's properly-supported motion for summary judgment. *See Granite State Mgmt. & Res. v. City of Concord*, 165 N.H. 277, 290 (2013); *see also Salitan v. Tinkham*, 103 N.H. 100, 103 (1960) (affidavits must contain facts not legal conclusions). Crowe's affidavit contains dozens of legal conclusions about the essential functions of the assembler position at Appalachian, Crowe App. at 99-100, 102, Crowe Aff., ¶¶ 6-7, 13-14, 27, her sciatica being a disability pursuant to the ADA, Crowe App. at 99-100, Crowe Aff., ¶¶ 11-12, 16, requests for reasonable accommodations, Crowe App. at 99-102, Crowe Aff., ¶¶ 13-16, 18-20, 23, 28-29, whether her requests would be an undue burden on Appalachian, Crowe App. at 100, Crowe Aff., ¶ 15, whether Appalachian was required to engage in an interactive dialogue with her, Crowe App. at 102, Crowe Aff., ¶ 30, and whether Appalachian's actions were discriminatory. Crowe App. at 101, Crowe Aff., ¶ 21. Just as Crowe could not rely on these legal conclusions to defeat Appalachian's motion for summary judgment, she cannot rely on them on appeal. The trial court correctly granted Appalachian's motion for summary judgment, and this Court should affirm the Order.

CONCLUSION

For the foregoing reasons, this Court should affirm the Order and rule that Crowe's discrimination and retaliation claims fail as a matter of law.

Respectfully submitted,

APPALACHIAN STITCHING COMPANY, LLC,

By Its Attorneys,

PRIMMER PIPER EGGLESTON & CRAMER PC,

Date: July 19, 2021 By: /s/ Gary M. Burt

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STATEMENT WITH RESPECT TO ORAL ARGUMENT

Appalachian respectfully requests 15 minutes to present oral argument. Gary M. Burt will represent Appalachian at oral argument.

Date: July 19, 2021 /s/ Gary M. Burt
Gary M. Burt (N.H. Bar No. 5510)

CERTIFICATION OF WORD LIMIT

I hereby certify that the total words in this Brief do not exceed 9,500 words.

Date: July 19, 2021 /s/ Gary M. Burt
Gary M. Burt (N.H. Bar No. 5510)

CERTIFICATION

I hereby certify that on this day a copy of this Brief was served via the Court's electronic filing system on counsel for Crowe.

Date: July 19, 2021 /s/ Gary M. Burt
Gary M. Burt (N.H. Bar No. 5510)

BRIEF ADDENDUM

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS. **SUPERIOR COURT**

No. **215-2019-CV-00159**

PATRICIA CROWE

v.

APPALACHIAN STITCHING COMPANY, LLC

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

In this civil action the plaintiff, Patricia Crowe, asserts disability discrimination and failure to accommodate claims under the Americans with Disabilities Act ("ADA") and RSA chapter 354-A and retaliation claims under the ADA and RSA chapter 354-A against the defendant, Appalachian Stitching Company, LLC ("Appalachian"). This matter is now before the Court on the defendant's Motion for Summary Judgment (Index #10), which is supported by a Memorandum of Law (Index #11) and a Statement of Material Facts. (Index #12). The plaintiff has filed an objection (Index #15), a Memorandum of Law (Index #16), and her Response to the defendant's Statement of Material Facts (Index #20), to which the Court will refer as the Final Statement of Material Facts ("FSMF"). The plaintiff has also filed a Statement of Disputed Material Facts (Index #17), to which the defendant filed a Response. (Index #23). In addition, the defendant has filed a Reply. (Index #22). Because the Court finds that a hearing will not aid in its analysis, the Court acts on the basis of the parties' pleadings and the record before it. See Super. Ct. Civ. R. 13(b). Based on the parties' pleadings and arguments, the undisputed material facts, and the applicable law, the Court finds and rules as follows.

I. Factual Background

The summary judgment record reflects the following material facts which, unless otherwise

noted, are undisputed and are drawn from the Final Statement of Material Facts. The defendant hired the plaintiff as an assembler on June 6, 2016. (FSMF ¶1.) The job description for an assembler states that "[w]hile performing the duties of this job, the employee is regularly required to stand for prolonged periods of time." (Id. ¶3.) The job description for an assembler further provides that an employee "[m]ust have the ability to bend, lift and turn, freely." (Id. ¶4.)

Early on May 8, 2017, the plaintiff sent a text to the defendant's human resources director, Jodie Wiggett ("Wiggett") advising Wiggett that the plaintiff had been at the hospital emergency room with her husband "most of the night," had gotten "very little sleep," and felt "like [crap] so I'm not coming in ok?" (Id. ¶5.) Wiggett "okayed" the plaintiff's request to be excused from work, stating "K, have the ER fax over a note . . . Thanks." (Id. ¶6.) The plaintiff returned to work on May 9, 2017, but did not provide Wiggett with a note from the hospital before doing so. (Id. ¶7.) Later that day the plaintiff informed Melody Dumais ("Dumais"), the defendant's lead floor person, that she "had been diagnosed with sciatica" and that she "would need to sit for a limited amount of time . . . until the pain relieved and then [she] could go back to a standing position." (Id. ¶8.) Thereafter, Wiggett spoke with the plaintiff and asked her to provide a doctor's note. (Id. ¶9.) On May 12, 2017, the plaintiff provided Wiggett with Littleton Regional Healthcare Patient Discharge Instructions that included a highlighted, capitalized instruction reading "NO LIFTING, BENDING OR STOOPING FOR 1 WEEK." (Id. ¶13.) Later on May 12, 2017, the defendant received a fax from Dr. Jeffrey Reisert ("Dr. Reisert") stating that he had seen the plaintiff that day for "non-worked related back pain" and that he had "asked that she not work until she is seen back in follow up by me in one week." (Id. ¶15.) On May 19, 2017, Dr. Reisert faxed another letter to the defendant stating that "Mrs. Crowe still cannot return to work due to NON-work related back problems. She remains under treatment." (Id. ¶16.) The plaintiff never provided the defendant with a doctor's note stating that the plaintiff was capable of returning to work. (Id. ¶17.) The

plaintiff never returned to work at Appalachian after May 12, 2017. (Id. ¶19.)

The plaintiff was an at-will employee at Appalachian. (Id. ¶22.) She missed eight days of work between May 20, 2017, and June 1, 2017. (Id. ¶21.) The defendant's Employee Policy Manual, the signature page of which the plaintiff executed on June 4, 2016, provides that "[e]mployees who are absent from work for three consecutive days without calling in will be considered to have voluntarily quit." (Id. ¶¶23, 24.) The defendant determined that the plaintiff had voluntarily quit her position "based on her failure to provide any information regarding her intent or ability to return to work between May 20, 2017, and June 1, 2017." (Id. ¶23.) The plaintiff asserts that she attempted to contact Wiggett on or around May 23 or 24, 2017, about returning to work but "never heard back from" Wiggett, and the plaintiff denies that she voluntarily quit her employment with the defendant. (Id. ¶¶20, 21, 23.)

II. Standard of Review

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:9-a, III; see Super. Ct. Civ. R. 12(g). "An issue of fact is 'material" for purposes of summary judgment if it affects the outcome of the litigation under the applicable substantive law." VanDeMark v. McDonald's Corp., 153 N.H. 753, 756 (2006) (citation omitted). The moving party bears the burden of proving its entitlement to summary judgment. Concord Grp. Ins. Cos. v. Sleeper, 135 N.H. 67, 69 (1991). In evaluating a motion for summary judgment, the Court considers "the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of all favorable inferences that may be reasonably drawn from the evidence." Id.

III. Discussion

The defendant argues that each of the plaintiff's disability discrimination claims and retaliation claims under the ADA and RSA chapter 354-A "is fatally flawed" because:

> Crowe never provided Appalachian with a doctor's note confirming that she could return to work. Without such a note, Crowe was not a "qualified individual" for the purposes of the ADA or [RSA chapter 354-A]. As Crowe was not a "qualified individual," she cannot maintain a discrimination claim under state or federal law.

(Def's Mot. Summ. J. ¶4.) The defendant further contends that because the plaintiff was not a "qualified individual" within the meaning of the ADA or RSA chapter 354-A, the defendant "was not obligated to make reasonable accommodations for her, nor to allow her to work against her doctor's orders." (Id. ¶5.) The plaintiff maintains that "the evidence clearly demonstrates that Mrs. Crowe was a qualified disabled individual" and that, at the very least, there are disputed issues of material fact regarding the plaintiff's "ability to perform the essential functions of her position." (Pl.'s Obj. at 1; Pl.'s Mem. Law at 1,8.)

The ADA prohibits a "covered entity" from discriminating "against **a qualified individual** on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a) (emphasis added). Under the ADA, such discrimination against a qualified individual includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual. Id. § 12112 (b)(5)(A). "In order to establish a *prima facie* case of ADA employment discrimination, a plaintiff must show", among other things, "that she was able to perform the essential functions of her job with or without accommodation." Duhy v. Concord General Mut. Ins. Co., 2009 WL 1650024 at *8 (D.N.H. June 10, 2009). "An employee who has not been released by her doctor to return to work is not qualified to perform the essential functions of the job." Pate v. Baker Tanks Gulf South, Inc., 34 F. Supp.

2d 411, 416 (W.D. La. 1999); see Gantt v. Wilson Sporting Goods Co., 143 F. 3d 1042, 1047 (6th Cir. 1998). As such, an employee whose doctor has not released her to return to work is not a "qualified individual" under the ADA. See e.g. E.E.O.C. v. Methodist Hospitals of Dallas, 218 F. Supp. 3d 495, 501 (N.D. Tex. 2016); Horn v. Southern Union Gas Co., 2009 WL 462697 at *5 (D.R.I. Feb. 20, 2009); Kitchen v. Summers Continuous Care Center, LLC, 552 F. Supp. 2d 589, 594 (S.D. W. Va 2008).

The summary judgment record in this case establishes, as a matter of law, that the plaintiff is not a "qualified individual" within the meaning of the ADA and that, therefore, the defendant is entitled to summary judgment on the plaintiff's ADA discrimination claims. The undisputed material facts show that (1) on May 9, 2017, the plaintiff told Dumais that she "had been diagnosed with sciatica" and "would need to sit for a limited amount of time ... until the pain relieved and then [she] could go back to a standing position" (FSMF ¶8); (2) on May 12, 2017, the plaintiff gave Wiggett the Littleton Regional Healthcare Patient Discharge Instructions for the plaintiff stating "NO LIFTING, BENDING OR STOOPING FOR 1 WEEK" (Id. ¶13); (3) later that day the defendant received a fax from Dr. Reisert instructing the plaintiff not to work until he saw her for a follow up visit in one week (Id. ¶15); (4) on May 19, 2017, Dr. Reisert notified the defendant by fax that the plaintiff "still cannot return to work due to NON-work related back problems" and "remain[ed] under treatment" (Id. ¶16); (5) the plaintiff never furnished to the defendant "a doctor's note stating that she was capable of returning to work" (Id. ¶17); and (6) the plaintiff never did return to work after May 12, 2017. (Id. ¶19). As a matter of law, at all relevant times the plaintiff was not qualified to perform the essential functions of her job and was not a "qualified individual" as that term is used in the pertinent provisions of the ADA. See Gantt, 143 F. 3d at 1047; Kitchen, 552 F. Supp. 2d at 594. The plaintiff's assertion that her job as an assembler at Appalachian "did not require lifting, bending and stooping" (Crowe Aff. ¶7), does not create a genuine issue of material fact for two

separate reasons. First, absent certain circumstances that do not appear in the summary judgment record, it is the employer, not the employee, who determines the essential functions of the job. See Davidson v. Am. Online, Inc., 337 F. 3d 1179, 1991 (10th Cir. 2003); see also Lloyd v. Swifty Transp., Inc., 552 F. 3d 594, 601 (7th Cir. 2009); Dropinski v. Douglas Cty., Neb., 298 F. 3d 704, 709 (8th Cir. 2002); Cruz v. McAllister Bros., 52 F. Supp. 2d 269, 284 (D.P.R. 1999). Second, it is undisputed that the plaintiff never provided the defendant with a release authorizing her to return to work but only documentation indicating that she could not return to work.

The defendant is likewise entitled to summary judgment on the plaintiff's ADA retaliation claims. The plaintiff asserts that the defendant retaliated against her "for requesting . . . reasonable accommodations." (Pl's Mem. Law, 16.) Under the ADA, however, an employer is required to participate in an interactive accommodation process and to make reasonable accommodations only for "an otherwise qualified individual." 42 U.S.C. §12112(b)(5)(A); see Hohider v. United Parcel Serv., Inc., 574 F. 3d 169, 194 n.20 (3d Cir. 2009); Gibson v Milwaukee County, 95 F. Supp. 3d 1061, 1068 n.3 (E.D. Wis. 2015) (observing that "an employer is not required to engage in the interactive process where . . . the employee was not a qualified individual"). Because the undisputed material facts establish that the plaintiff suffered an injury or illness (sciatica), was instructed by her doctor not to return to work, and was not medically released to return to work, she is not a "qualified individual" under the ADA. See E.E.O.C. v. Methodist Hospitals of Dallas, 218 F. Supp. 3d at 501; Pagel v. Premier Mfg. Support Servs., Inc., 2005 WL 1785178 at *8 (M.D. Tenn. July 21, 2005). Accordingly, the plaintiff's retaliation claims under the ADA fail as a matter of law.

The defendant is entitled to summary judgment on the plaintiff's discrimination and retaliation claims under RSA chapter 354-A for the same reason: she is not a qualified individual. The plaintiff's state law claims are predicated on her being "a qualified individual with a disability."

(Pl.'s Compl. ¶62); see RSA 354-A:7, VII. In interpreting the provisions of RSA chapter 354-A, the New Hampshire Supreme Court has found analogous federal law "instructive." See Madeja v MPB Corp., 149 N.H. 371, 379 (2003). Applying the applicable and well settled federal law as discussed hereinabove, the Court concludes that the undisputed material facts demonstrate that the plaintiff is not a "qualified individual" within the meaning of RSA chapter 354-A.

IV. Conclusion

For the foregoing reasons, the Court rules that the defendant is entitled to judgment as a matter of law on the plaintiff's ADA and RSA chapter 354-A claims. Accordingly, the Court GRANTS the defendant's Motion for Summary Judgment.

SO ORDERED.

Dated: 3/1/2021

Peter H. Bornstein
Presiding Justice

PHB:lat

Clerk's Notice of Decision
Document Sent to Parties
on 03/01/2021