IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CECILIA L. GIORDANO, Plaintiff, v. ADAPTIVE LEARNING CENTER FOR INFANTS AND CHILDREN, INC., Defendant.	CIVIL ACTION NO. 1:19-cv-5720-ELR-CMS

NON-FINAL REPORT AND RECOMMENDATION

This employment discrimination and breach of contract action is before me on a motion for summary judgment and brief filed by Adaptive Learning Center for Infants and Children, Inc. (Adaptive) [Docs. 44, 44-10], Cecilia L. Giordano's response [Doc. 64], Adaptive's reply [Doc. 67], and the parties' statements of material fact and responses, as amended [Docs. 48, 65]. For the reasons stated below, I will recommend that Adaptive's motion for summary judgment be denied.

I. The Summary Judgment Standard and Summary Judgment Procedures

"[A]t the summary judgment stage the judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Sears v. Roberts*, 922 F.3d 1199, 1205 (11th Cir. 2019) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). Thus, "[t]he

Court reviews the evidence and draws all reasonable inferences in the light most favorable to the non-moving party," and "[a] genuine issue of material fact exists when 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Marchisio v. Carrington Mortg. Servs., LLC*, 919 F.3d 1288, 1300 (11th Cir. 2019) (quoting *Anderson*, 477 U.S. at 248). Consequently, summary judgment "shall be granted" only if the movant "shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a).

The Federal Rules of Civil Procedure establish specific procedures for supporting (and disputing) factual positions at the summary judgment stage. *See* FED. R. CIV. P. 56(c)–(e). In addition, the Scheduling Order and Case Management Instructions entered in this case provided further directions and exemplars illustrating how the movant's Statement of Material Facts (SMF), the respondent's Response to Statement of Material Facts (RSMF), the respondent's Statement of Additional Facts (if any) (SAF), and the movant's Response to the Statement of Additional Facts (if any) (RSAF) should be prepared. *See* [Doc. 25 at *passim*].

Furthermore, the Federal Rules of Civil Procedure provide that when one party's statements of fact are not properly disputed by the other party, those statements of fact may be considered undisputed. *See* FED. R. CIV. P. 56(e)(2). Here,

Adaptive did not respond to Giordano's amended SAF, thus admitting as undisputed—for purposes of its motion for summary judgment only—all of her statements of additional fact. *See* FED. R. CIV. P. 56(e)(2).[1]

II. Factual and Procedural Background

Adaptive provides services to special needs children so that they can "learn, play and grow with other students in pre-school classrooms." [Doc. 44-10 at 3]. Giordano began working for Adaptive part-time in 2007. [*Id.*]. For the 2018–19 school year, Giordano worked as a part-time Inclusion Specialist. [SAF at p. 4].

On December 13, 2018, an Adaptive employee responded to a phone call that she "could not understand," except for the words "parking lot," and found Giordano in her car "choking, . . . drooling and saying she could not control her arms and legs." [SMF ¶¶ 4, 6]. Someone called 911. [SMF ¶ 6]. The following day, when Giordano sought to drive her car home, she had to pull over because she was unable to drive "and her arms and legs were flailing uncontrollably." [SMF ¶ 9].

[1] The parties each submitted amended filings because their initial filings did not comply with the requirements of the Scheduling Order. For the reader's reference, Adaptive's amended SMF is docketed as Document 48, Giordano's amended RSMF is docketed as Document 65 (pages 1–3), and Giordano's amended SAF is docketed as Document 65 (pages 4–8).

On December 15, 2018, Adaptive received an email from Giordano's husband, Ken, indicating that she had suffered several more episodes/seizures the day before. [SMF ¶ 10]. Ken Giordano stated that the episodes were stress and anxiety induced. [SMF ¶ 10]. Giordano was hospitalized and then discharged on December 17, 2018. [SMF ¶ 11].

On December 20, 2018, Giordano sent an email to Adaptive saying she was ready to return to work. [SMF ¶ 12]. The next day, on December 21, 2018, when Giordano and her husband met with a number of Adaptive employees to discuss the situation, the Adaptive employees expressed concern about potential safety risks to the preschoolers and to Giordano herself. [SMF ¶ 13; RSMF ¶ 13].

According to Giordano, Adaptive had already decided before the meeting that it was not going to allow her to return to work [SAF ¶ 28], and Giordano gives the following undisputed account of what happened during the December 21, 2018 meeting in her SAF:[2]

- "During the December 21, 2018 meeting, [Cecilia and Ken Giordano] explained that she had been released to return to work without any restrictions, including driving, and that two neurologist[s] reviewing her EEG test results determined that she did not have epileptic seizures, but

[2] This fact and those that follow concerning what occurred during the meeting on December 21 come from Giordano's SAF, to which Adaptive did not respond. These facts are thus accepted as undisputed for purposes of resolving the pending motion for summary judgment. *See* FED. R. CIV. P. 56(e)(2).

rather seizure-like anxiety episodes due to Conversion Disorder." [SAF ¶ 29].

- "During the December 21, 2018 meeting, [Adaptive employee] Schoen stated that [Adaptive] was going to treat Giordano as if she had suffered seizures that could reoccur so it could not allow her to return to any classroom due to liability risk and exposure to [Adaptive] in case she injured herself, a co-worker, or a student while working. Schoen stated that this decision had nothing to do with her job performance, but was due to this liability risk." [SAF ¶ 30].

- "[Adaptive employee] Van Sant stated there was no guarantee that Giordano would not have seizure-like episodes again and that such episodes would scare young children." [SAF ¶ 31].

- "When Ken Giordano asked Schoen if he had consulted legal counsel on his decision, Schoen raised his voice and replied with something like, 'No, but this is a right to work state and if you want to go there, I will.'" [SAF ¶ 32].

- "Schoen stated that [Adaptive] would pay Giordano through January because it 'was the right thing to do.'" [SAF ¶ 33].

- "In response, Ken Giordano asked Schoen if [Adaptive] could pay her through the end of her contract term (which ended May 31, 2019[,] with final payment on June 30, 2019). Giordano immediately requested a release from her Restrictive Covenant Agreement. Schoen replied that he would consider these two requests." [SAF ¶ 34].

- "During the December 21, 2018 meeting, Schoen, Ward, and Van Sant never: asked for the medical discharge records that Giordano had brought to the meeting; informed her that she was being placed on temporary unpaid leave (or any type of leave at all); explained that she would need to provide a fitness for duty clearance before returning to work; provided her with any instructions on what to do after the meeting; clarified that she was not being terminated; or mentioned any possibility of placing her in another classroom at another school." [SAF ¶ 35].

Following the meeting, Adaptive paid Giordano through December 31, 2018, with all of her personal leave accounted for and did not pay her an extra paycheck for January. [SAF ¶ 38]. And, although Adaptive distributed an annual $50 gift card to its employees in December 2018, Giordano did not receive one. [SAF ¶ 39].

On January 3, 2019, Adaptive e-mailed Giordano and requested that she obtain a release from her physician to return to work with or without restrictions. [SMF ¶ 19]. Giordano did not provide the release; instead, she sent a letter on January 14, 2019, alleging that Adaptive had terminated her. [SMF ¶¶ 20-21].

This litigation followed.

III. Discussion

In late 2019, Cecilia Giordano filed a complaint alleging that Adaptive (1) discriminated against her in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101 (ADA), (2) retaliated against her in violation of the ADA, and (3) breached her employment contract in violation of Georgia state law. *See* [Doc. 1 at *passim*.]

In its motion for summary judgment, Adaptive does not address Giordano's three separate claims but rather makes an overarching argument that it is entitled to summary judgment because "Plaintiff was never terminated as a result of disability or otherwise" and she has "no direct evidence to support her position." [Doc. 44-10

at 8–9]. In making this argument, Adaptive never states the elements of an ADA discrimination claim, an ADA retaliation claim, or a state law breach of contract claim. Adaptive does not, for example, challenge Giordano's status as "disabled" or as a "qualified individual within the meaning of the ADA or contend that there was no reasonable accommodation it could have made that would have allowed Giordano to perform the essential functions of her job. *See, e.g.*, *Lewis v. City of Union City*, 934 F.3d 1169, 1179-85 (11th Cir. 2019). On the contrary, Adaptive simply argues—purely as a factual matter—that it did not terminate Giordano's employment.[3]

As noted above, Giordano provided the Court with evidence that she was terminated. In its reply brief, Adaptive attempts to dispute Giordano's facts and show that Giordano's account of the December 21, 2018 meeting and subsequent events is inaccurate. *See* [Doc. 67 at *passim*]. For example, Adaptive provides a copy of Giordano's employment contract to show that it had the contractual right to

[3] Adaptive cites to only two cases in argument—one for the unremarkable proposition that guesses or speculation that raise merely a conjecture or possibility are not sufficient to create an inference of fact for consideration on summary judgment, and another that describes what "direct evidence" is. I note that a plaintiff is not required to produce direct evidence to prevail on an ADA claim; indeed, it is appropriate and commonplace for an ADA plaintiff to rely on circumstantial evidence. *See generally Lewis v. City of Union City*, 934 F.3d 1169 (11th Cir. 2019).

modify Giordano's employment location away from SSUMC. [Doc. 67 at 2]. Adaptive also provides an affidavit alleging that Giordano was not paid for unpaid vacation. [*Id.* at 2–4]. And Adaptive argues that Giordano was not told specifically that she was fired and that, in its view, Giordano mischaracterized the conversation about Georgia being a right-to-work state and about whether legal counsel had been consulted. [*Id.* at 5–6].

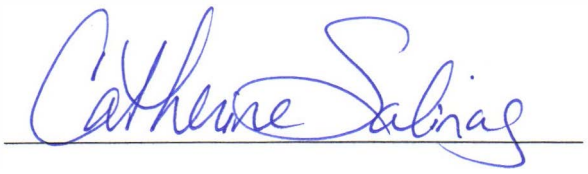
Even if Adaptive had properly responded to Giordano's SAF–which it did not–a disputed issue remains as to whether Adaptive fired Giordano or she resigned. That this is a classic dispute over a material fact is highlighted by lack of caselaw in Adaptive's brief that treats this as and resolves it as a matter of law. Simply put, this is a dispute over a material fact that only a jury can resolve. *See Sears*, 922 F.3d at 1205. It is possible that Adaptive can persuade a jury that it did not terminate Giordano on December 21, 2018, and that Adaptive later sought in good faith to explore with her whether she was medically cleared to return to work and whether any reasonable accommodation existed that would permit her to continue as an Inclusion Specialist with special needs children. But on the present record and at the summary judgment stage, Adaptive plainly is not entitled to judgment as a matter of law.

IV. Conclusion

For the reasons stated above, I **RECOMMEND** that Adaptive's motion for summary judgment [Doc. 44] be **DENIED**.

I **DIRECT** the Clerk to terminate the referral of this civil action to me.

SO REPORTED, RECOMMENDED, AND DIRECTED, this 23rd day of March, 2021.



Catherine M. Salinas
United States Magistrate Judge