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

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. KAISER FOUNDATION HEALTH PLAN OF GEORGIA, INC., Defendant.	:	CIVIL ACTION NO. 1:19-cv-5484-AT

ORDER

This matter is before the Court on the Magistrate Judge's Report & Recommendation ("R&R") [Doc. 106]. The R&R recommends that Plaintiff's Motion for Partial Summary Judgment [Doc. 64] be granted and that Defendant's Motion for Summary Judgment [Doc. 85] be denied.

If no objections to the R&R are filed, then the Court reviews the Magistrate Judge's R&R for clear error. 28 U.S.C. § 636(b)(1). But if a party objects to the R&R, the district court must review de novo any part of the R&R that is the subject of a proper objection. Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b). Defendant timely filed objections to the R&R. [Doc. 108]. Plaintiff did not file any objections. The Court reviewed de novo all portions of the R&R to which Defendant objected. The Court further reviewed all other portions of the R&R for clear error.

By way of summary, this case involves an employer's alleged failure to accommodate one of its employees, Sharion Murphy, by allowing her to use a non-revolving door to enter her workplace because she has claustrophobia. Plaintiff alleges that Defendant's failure to accommodate Murphy "deprive[d] Murphy of equal employment opportunities and otherwise affect[ed] her status as an employee because of her disabilities" in violation of Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq*. (Compl., Doc. 1 ¶ 38.) Although Defendant ultimately provided Murphy with the accommodation after it obtained additional information about how the accommodation was necessary for Murphy to perform the essential functions of her job, Plaintiff argues that Defendant failed to provide the accommodation from the date of Murphy's initial request on January 28, 2017 until the date it approved the request on July 21, 2017, and that Defendant's nearly six-month delay in providing the accommodation violated the ADA. (Pl.'s Mot. for Partial Summ. J., Doc. 64-1 at 22.) Defendant argues in its own motion for summary judgment that the letter from Murphy's physician that she submitted to Defendant in January 2017 did not state whether Murphy's claustrophobia affected her ability to perform her job or for how long she would need an accommodation, and that Defendant "needed to know this information" before it could grant Murphy's accommodation request. (Def.'s Mot. for Summ. J., Doc. 85-1 at 21–22.)

Plaintiff contends that Defendant's interpretation "ignores the clear language of the ADA that making the workplace accessible is an accommodation

under the ADA" and improperly insists that "any accommodation must relate to an employee's job function." (Pl.'s Opp'n to Def.'s Mot. for Summ. J., Doc. 95 at 2.) Defendant counters that under Eleventh Circuit precedent an employer is required to provide an employee with an accommodation under the ADA "only if it enables the employee to perform the essential functions of the job," and, as a consequence, "a failure-to-accommodate claim must be viewed through the perspective of how the requested accommodation would enable the employee to perform the job." (Def.'s Reply in Supp. of Mot. for Summ. J., Doc. 101 at 1, 10.)

The Magistrate Judge addressed these arguments in detail in a 49-page R&R. In the R&R, the Magistrate Judge rejected Defendant's argument that it was not obligated to provide the requested accommodation until it had information about how it was necessary for the employee to perform her essential job functions on the ground that Defendant "took too narrow a view of its reasonable accommodation obligation" under the ADA. (R&R, Doc. 106 at 28.)

As the Magistrate Judge stated in the R&R, to establish a *prima facie* case of disability discrimination under the ADA, Plaintiff must establish that the employee (1) "is disabled"; (2) "was a 'qualified individual' at the relevant time, meaning she could perform the essential functions of the job in question with or without reasonable accommodation"; and (3) "was discriminated against by way of the defendant's failure to provide a reasonable accommodation." (*Id.* at 30) (quoting *Solloway v. Clayton*, 738 F. App'x 985, 987 (11th Cir. 2018) (per curiam)). If Plaintiff satisfies all three elements, "the burden shifts to the employer

to prove that Plaintiff's requested accommodation imposes an undue hardship." (*Id.*) (quoting *Terrell v. USAir*, 132 F.3d 621, 624 (11th Cir. 1998).)

In the R&R, the Magistrate Judge found that the first two elements of Plaintiff's ADA claim were satisfied because Murphy was "disabled" under the ADA and she was a "qualified individual" for the job in question, (*id.* at 31–32); neither party objects to these findings. The parties' principal dispute is over the Magistrate Judge's treatment of the third element — whether Defendant discriminated against Murphy by failing to provide her with a reasonable accommodation at the appropriate time.

In analyzing this third element, the Magistrate Judge emphasized that employers have "two separate reasonable accommodation obligations" under the plain language of the ADA: one is the obligation of "making existing facilities used by employees readily accessible to and usable by individuals with disabilities" under 42 U.S.C. § 12111(9)(A), and the other is the obligation to accommodate employees through "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities" under 42 U.S.C. § 12111(9)(B). (R&R, Doc. 106 at 32–33.) The Magistrate Judge observed that, as Plaintiff argued, Murphy's request for an accommodation implicated Section 12111(9)(A) because the purpose of the accommodation was to make her workplace

facility itself accessible to her as a person as well as an employee with disabilities. (*Id.* at 33–34.) Although neither party cited any cases from the Eleventh Circuit addressing that particular provision of the ADA, the Magistrate Judge noted that two cases from other Circuits had — *Burnett v. Ocean Properties, Ltd.*, 987 F.3d 57 (1st Cir. 2021), and *Feist v. Louisiana, Department of Justice, Office of the Attorney General*, 730 F.3d 450 (5th Cir. 2013). (R&R, Doc. 106 at 34.) After a review of those cases, the Magistrate Judge concluded that "[t]he text of § 12111(9)(A), as interpreted by *Burnett* and *Feist*, shows that [Defendant] had a reasonable accommodation obligation to make the [work facility] readily accessible to [Murphy]," and "[t]hat obligation could easily have been met by allowing [Murphy] to use a non-revolving door within a reasonable time after she made that request." (*Id.* at 37.)

In making this determination, the Magistrate Judge also relied on the ADA's implementing regulations, which, much like the statute itself, impose obligations on employers to provide employees with two separate categories of accommodations: "[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position," 29 C.F.R. § 1630.2(o)(1)(ii) ("subsection (ii)"), and "[m]odifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without

disabilities," 29 C.F.R. § 1630.2(o)(1)(iii) ("subsection (iii)"). (R&R, Doc. 106 at 37–38.) The Magistrate Judge observed that, as was the case with the statutory provision at issue here, 42 U.S.C. § 12111(9)(A), the parties also had not identified any Eleventh Circuit cases interpreting the relevant *regulatory* provision at issue — subsection (iii). (R&R, Doc. 106 at 38.) However, the Magistrate Judge noted that other courts that *have* applied subsection (iii) have found that this subsection imposes separate, "independent requirements" from subsection (ii). (*Id.* at 41) (quoting *Lee v. Kaiser Found. Health Plan of the Nw.*, No. 3:16-cv-01991, 2018 WL 4523142, at *6 (D. Or. Apr. 9, 2018), *R&R adopted in part, rejected in part*, 2018 WL 3090195 (D. Or. June 20, 2018).) And under that separate, independent requirement "[e]mployers are not relieved of their duty to accommodate when employees are already able to perform the essential functions of the job" because "[q]ualified handicapped employees who can perform all job functions may require reasonable accommodation to allow them to . . . enjoy the privileges and benefits of employment equal to those enjoyed by non-handicapped employees." (*Id.* at 41–42) (quoting *Buckingham v. United States*, 998 F.2d 735, 740 (9th Cir. 1993).) As a matter of "logical necessity," the reasonableness of an employer's request for accommodation thus does not always "turn upon his performance of the essential functions of his position." (*Id.* at 44) (citing *Adams v. Crestwood Med. Ctr.*, 504 F. Supp. 3d 1263, 1303 (N.D. Ala. 2020)).

Based on these cases, the Magistrate Judge determined that Defendant had both an obligation to make the facility accessible to Murphy under 42 U.S.C. §

12111(9)(A) and an obligation under subsection (iii) to provide Murphy with access to benefits and privileges of employment equal to that of non-disabled employees by granting her accommodation request. (*Id.* at 44–45.) The Magistrate Judge emphasized that because courts that have applied these statutory and regulatory provisions "hold that the ADA does not limit reasonable accommodation to those which facilitate an employee's performance of essential job functions," Defendant was obligated to accommodate Murphy "without waiting to see whether her disability impacted her ability to perform the essential functions of her job." (*Id.* at 45.)

The Magistrate Judge also acknowledged the Eleventh Circuit cases cited by Defendant, but he noted that they involved requests for accommodations under different statutory and regulatory provisions, and none of them addressed "the issue raised here, which is plaintiff's need for accommodation to enter the workplace." (*Id.* at 45–48.) The Magistrate Judge opined that, "should the Eleventh Circuit eventually hear this case, it would follow decisions from other Circuits like *Feist* and *Burnett*[.]" (*Id.* at 46.)

In its objection, Defendant argues that, under Eleventh Circuit case law, it was error for the Magistrate Judge to conclude that employees raising accommodation requests under subsection (iii) are not required to show a nexus between the employee's accommodation request and an essential job function. In support of this position, Defendant argues that the employee in *Novella v. Wal-Mart Stores, Inc.*, 226 F. App'x 901 (11th Cir. 2007) raised accommodation

requests under both subsection (ii) and subsection (iii), and that there, the Eleventh Circuit still required the employee to tie both types of requests to an essential function of his job. (Def.'s Obj., Doc. 108 at 1–2.)

Defendant argues that a nexus to an essential job function is still required for both subsections under *Novella* because the Eleventh Circuit still imposed a nexus requirement there for both subsections even though it recognized that the two subsections were distinct. (*Id.* at 7–8.) In addition, in response to the Magistrate Judge's citation to *Adams*, Defendant argues that the court in *Adams* "explicitly stated" that, under the Eleventh Circuit's decision in *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249 (11th Cir. 2001), "[a]n accommodation is only reasonable if it allows the disabled employee to perform the essential functions of the job in question." (Def.'s Obj., Doc. 108 at 7) (alteration in original) (quoting *Adams*, 504 F. Supp. 3d at 1300.)

Defendant also argues that the two decisions the Magistrate Judge cited from other Circuits are both distinguishable. Defendant claims that *Burnett* is distinguishable because "the question as to whether installation of automatic doors would assist the employee in performing his job duties was never raised." (*Id.* at 2.) Defendant argues that in *Burnett* "there was no evidence that the employee had potential challenges once he was inside the workplace" and thus "the employer had complete information about the scope of the employee's limitations," whereas here, "Defendant did not have complete information about the extent of Murphy's claustrophobia" such as "whether it also impacted Murphy's ability to use

elevators, stairwells, etc." (*Id.* at 3–4.) Defendant similarly argues that *Feist* is distinguishable because "there was no evidence that the employee's limitations could impact what happened inside her workplace." (*Id.* at 5.) In addition, Defendant says *Feist* makes clear that an employer is only liable for failing to accommodate employees for "known limitations," and that this obligation was not triggered here until Defendant granted the request because Defendant did not know the "full extent" of Murphy's limitations. (*Id.* at 6) ("[T]he idea that Defendant here was obligated to provide Murphy's accommodation without knowing the full extent of her limitations is directly refuted by the *Feist* decision.")

Finally, Defendant says that although subsections (ii) and (iii) are equally enforceable, the R&R finds that Defendant should have "ceased its accommodation efforts after considering only its 'equal benefits and privileges' obligations" and "limited its consideration to building access and ignored what adjustments were necessary for Murphy inside the facility." (*Id.* at 10.) Defendant says this would put it in an "impossible situation" by forcing it to act on incomplete information. (*Id.* at 12.)

Plaintiff responds that Murphy requested an accommodation under 42 U.S.C. § 12111(9)(A) and subsection (iii), and that Defendant relies on statements by the Eleventh Circuit in cases that do not involve either of those provisions and which are not applicable here. (Pl.'s Resp., Doc. 109 at 3.) Plaintiff contends that "[t]his is an 'access to facilities' accommodation case under Section 12111(9)(A), not an 'assistance performing essential functions' accommodations case," and

none of the Eleventh Circuit cases Defendant cites "hold that an employee seeking access to a workplace must show how that access affects her ability to perform her job." (*Id.* at 7.)

The Court begins with Defendant's arguments about *Novella*. In *Novella*, the question was whether an employer was required to provide a deaf employee with an interpreter at a termination meeting. Plaintiff argued the ability to communicate effectively at his termination meeting with the assistance of an interpreter was both an essential function of the employee's job and a benefit and privilege of employment. 226 F. App'x at 902. The court held that the employer was not required to provide the accommodation under either theory because the employee's communication at a termination meeting – the central purpose of which was to give the employee notice of his termination -- did not constitute an essential function of the job for which an accommodation was needed. *Id.* at 903 (citing as authority *LaChance v. Duffy's Draft House, Inc.*, 146 F.3d 832. 835 (11th Cir. 1998), "[a]n 'accommodation' is 'reasonable'—and, therefore, required under the ADA—only if it enables the employee to perform the essential functions of the job.")

First, the Court does not view *Novella* as supporting Defendant's argument, despite Defendant's argument to the contrary. The Court in *Novella* found that the plaintiff's job functions and duties had effectively ceased at the point of his termination meeting. Therefore, in its view, the interpreter accommodation requirement was not "reasonable" and required under the ADA as participation in

the termination meeting was not an essential function of the job.[1] By contrast, in this case, Plaintiff's claim focuses on the employer's failure to provide requisite accommodations to facilitate Plaintiff reasonably accessing her worksite to perform her duties in the first six months of her job. In short, *Novella* is not controlling or actually even instructive given the differences in the factual postures of this case.

The Court additionally notes that even if the Court were to accept Defendant's contention that *Novella* provides instructive authority, as an unpublished decision it is not binding. *See* 11th Cir. R. 36-2 ("Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority."). And as the Eleventh Circuit has stated, "Unpublished opinions are not controlling authority and are persuasive only insofar as their legal analysis warrants." *Bonilla v. Baker Concrete Constr., Inc.*, 487 F.3d 1340, 1345 n.7 (11th Cir. 2007). The Court does not find the legal analysis in *Novella* persuasive for two reasons.

First, as the Magistrate Judge pointed out, the Eleventh Circuit relied on a proposition from *LaChance* in its decision in *Novella*, and that proposition from *LaChance* was based on a provision of the ADA's implementing regulations that is not at issue here. When the Eleventh Circuit stated in *LaChance* that "[a]n

[1] The Court in *Novella* noted that the Circuit had not previously addressed the question of whether a termination meeting where the employee would be permitted to address the charges against him constituted a benefit and privilege of employment – but it then proceeded instead to analyze the case based on whether communication at a termination meeting constituted an essential function of the position.

'accommodation' is "reasonable"—and, therefore, required under the ADA—only if it enables the employee to perform the essential functions of the job," it cited to subsection (ii), not subsection (iii). 146 F.3d at 835 and n.9; *see* (R&R, Doc. 106 at 46–47.) For this reason, the Magistrate Judge concluded, "even if the statement relied upon by [Defendant] applies, it applies only to accommodations required by § 1630.2(o)(1)(ii), not accommodations required by § 1630.2(o)(1)(iii)."[2] (R&R, Doc. 106 at 47–48.)

Second, reading a nexus requirement into subsection (iii) would undermine the plain language of the ADA. The statute expressly states that employees are obligated to accommodate employees by "making existing facilities used by employees readily accessible to and usable by individuals with disabilities." 42 U.S.C. § 12111(9)(A). That same language is repeated in the ADA's implementing regulations. *See* 29 C.F.R. § 1630.2(o)(2)(i). The text "gives no indication" that requests like Murphy's "must facilitate the essential functions of one's position" to trigger the employer's obligation. (R&R, Doc. 106 at 36) (quoting *Feist*, 730 F.3d at 453.) And as the Supreme Court has repeatedly emphasized, "[w]hen the statutory 'language is plain, the sole function of the courts—at least where the

[2] Separately, it appears to the Court that the language Defendant relies on from *Novella* and *LaChance* may represent a conflation of the third element of an ADA claim with the second element. The issue before the Eleventh Circuit in *LaChance* was whether the employee was a "qualified individual" for purposes of the ADA because he could not perform his job safely. 146 F.3d at 834–36. The employee had to establish that he was a "qualified individual" for purposes of the ADA to satisfy the second element of his ADA claim. But that element is not at issue here; the Magistrate Judge already found, and Defendant does not dispute, that Murphy was a qualified individual under the ADA and that Plaintiff had therefore satisfied the second element of its ADA claim. The question here is whether Plaintiff has satisfied the third element, which is an issue that the court in *LaChance* never reached.

disposition required by the text is not absurd—is to enforce it according to its terms.'" *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000)). Here, Defendant's preferred reading would not only require the Court to ignore the plain language of the ADA; it would also lead to absurd results.[3]

To give an example, on Defendant's reading, someone like the employee in *Lee*, who was seeking to be able to work a modified schedule without having to use her sick leave, which, in turn would give her equal access to sick leave benefits, 2018 WL 4523142, at *6, would first have to show that her sick leave benefits were an essential function of her job. In other words, she would have to show that taking leave from work was an essential component of her work to be able to take leave from work. That approach would make no sense. And in this Court's view that is not required because, based on the plain language of the ADA, disabled employees like the employee in *Lee* are entitled to enjoy equal access to sick leave benefits even though these benefits may not be tied to an essential function of their jobs. The same is true of Murphy. She was entitled to equal access to a specific benefit or privilege of employment relative to that of non-disabled employees — the ability to enter her work facility.

[3] As the Magistrate Judge stated, essential job functions "are not relevant" to accommodation requests under subsection (iii), which allow employees with disabilities to "enjoy equal benefits and privileges of employment" compared to employees without disabilities. (R&R, Doc. 106 at 47.)

Defendant's attempt to undermine the district court's decision in *Adams* is also not persuasive. In its objection, Defendant emphasizes that, consistent with the Eleventh Circuit's decision in *Lucas*, *Adams* still states, "[T]o be sure, Eleventh Circuit decisions declare that '[a]n accommodation is only reasonable if it allows the disabled employee to perform the essential functions of the job in question.'" (Def.'s Obj., Doc. 108 at 7) (quoting *Adams*, 504 F. Supp. 3d at 1300). But the plaintiff in *Lucas* was seeking an accommodation under 42 U.S.C. § 12111(9)(B) and subsection (ii), 257 F.3d at 1256, neither of which are at issue here. And, in the very next sentence of the *Adams* opinion, the court states, quoting *Lucas*, "However, the Eleventh Circuit likewise provides that 'the ADA may require an employer to restructure a particular job by *altering or eliminating some of its marginal functions* . . . .'" *Adams*, 504 F. Supp. 3d at 1300 (emphasis in original) (quoting *Lucas*, 257 F.3d at 1260). Marginal functions are not essential functions; thus, both *Adams* and *Lucas* expressly acknowledge that, contrary to Defendant's assertion, there may be circumstances in which employers are obligated to provide reasonable accommodations to their employees even though the accommodation is not tied to an essential function of the employee's job.

Defendant's efforts to distinguish *Burnett* and *Feist* fare no better. Regarding *Burnett*, all Defendant is saying is that the present case is both a subsection (iii) case and a subsection (ii) case, whereas *Burnett* was just a subsection (iii) case. Its argument is, in effect, that unlike the employer in *Burnett*, Defendant lacked some outstanding information about the subsection (ii)

component of its employee's request and that this outstanding information prevented it from acting. But needing more information about the subsection (ii) component of the case — assuming that there was one — does not justify a delay in granting the subsection (iii) component. The same is true with respect to *Feist*. And though *Feist* stands for the proposition that employers are only obligated to provide accommodations for an employee's "known" limitations, the fact that Defendant may not have known the "full extent" of Murphy's limitations did not justify its delay in acting on the limitations that it did know about; specifically, that she could not use the revolving door because of her claustrophobia. Knowing this, Defendant was required to provide Murphy with an accommodation.

Finally, as for Defendant's contention that the R&R's approach would require it to act based on incomplete information, all the R&R required was that Defendant act on the non-revolving door component of Murphy's request once its obligation to grant that request was triggered. The fact that Defendant lacked information about unnecessary aspects of that request (*i.e.*, whether the accommodation was necessary for Murphy to perform the essential functions of her job) and tangential issues about other, potentially related issues that Murphy had not raised — such as whether she would need an accommodation to avoid using elevators — was irrelevant. Defendant had all of the information it needed to grant Murphy's request with respect to the revolving doors.

After a careful de novo review of the portions of the R&R to which Defendant objects, this Court agrees with the R&R in all respects. Furthermore, the Court reviewed the remainder of the R&R for clear error and found none.

Accordingly, the Court hereby **OVERRULES** Defendant's objections and **ADOPTS** the Magistrate Judge's Report and Recommendation as the opinion of this Court. Plaintiff's Motion for Partial Summary Judgment [Doc. 64] is **GRANTED** and Defendant's Motion for Summary Judgment [Doc. 85] is **DENIED**.

This case is potentially resolvable by the parties, given the Court's findings here, which narrow the scope of the controversy to the issue of damages. The Court therefore **ORDERS** the parties to attend mediation to be conducted by a magistrate judge of this Court. The Clerk is **DIRECTED** to refer this action to the next available magistrate judge for the purpose of conducting the mediation. The mediation is to be concluded within 45 days of this Order unless otherwise extended by the assigned magistrate judge. The parties are **DIRECTED** to file a status report regarding the results of the mediation with the Court within five days of the mediation's conclusion. In the event the mediation is unsuccessful, the parties are **DIRECTED** to file a proposed consolidated pretrial order within 30 days of the conclusion of the mediation.

IT IS SO ORDERED this 9th day of August, 2021.

AMY TOTENBERG
UNITED STATES DISTRICT JUDGE