IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel D. Domenico

Case No. 1:20-cv-03793-DDD-MEH

BETHANY SCHEER,

Plaintiff,

v.

SISTERS OF CHARITY OF LEAVENWORTH HEALTH SYSTEM, INC.,

Defendant.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

This case arises from a dispute between Plaintiff Bethany Scheer and her former employer, Defendant Sisters of Charity of Leavenworth Health System, Inc. (SCL). Ms. Scheer alleges that SCL perceived her as having a mental health disability and discriminated against her by conditioning her employment on a willingness to engage mental health support services—a condition which she refused. She brings claims of discrimination and retaliation under both the ADA Amendment Act, and the Rehabilitation Act. SCL has moved for summary judgment on all claims. The motion is granted.

BACKGROUND

For purposes of the present motion, the following facts are not disputed per the parties' statements of undisputed facts unless otherwise noted. Doc. 37 at 2–12; Doc. 45 at 2–19; Doc. 48 at 2–11.[1]

Ms. Scheer was employed by SCL as a Patient Accounts Representative from 2014 until 2019. During that time, Ms. Scheer inconsistently met the productivity goals set by SCL, and she received multiple corrective actions or notices from her superiors in that regard during performance reviews. Ms. Scheer reported to Kathy Orsborn. Ms. Orsborn at different times reported to either Jennifer Reeves or Danielle Stowell. Because of Ms. Scheer's recurrent and inconsistent productivity issues, her superiors determined that she should be placed on a "performance improvement plan" meant to help Ms. Scheer meet her goals.

After her supervisors had concluded to issue a performance improvement plan, but before it had been drafted and presented to her, Ms. Scheer had multiple conversations with co-workers, including Ms. Stowell, in which she was visibly upset, cried, and expressed feelings of sadness. The precise extent or content of those conversations is disputed, but at least three SCL employees, including Ms. Stowell, came away from those conversations believing that Ms. Scheer was having suicidal thoughts or could harm herself. Lani Rasmussen, Bethany Krech, and Ms. Stowell informed Ms. Orsborn of their conversation and concerns over Ms. Scheer's mental state. Based on the concerns expressed to them, Ms. Scheer's supervisors decided to include in her

[1] The parties' statements of disputed and undisputed facts are lengthy and contain significant argumentation and commentary. The parties are reminded that such statements should be "set forth in simple, declarative sentences" and "accompanied by a *brief* factual explanation." DDD Civ. P.S. III(E)(1) (emphasis added).

performance improvement plan a mandatory referral to mental health services through SCL's employee assistance program ("EAP").

When Ms. Scheer next met with her supervisors, she was presented with her productivity improvement plan, including the mandatory referral requirement. Ms. Scheer expressed displeasure at the requirements—she did not contest her need for counseling, but she preferred to seek it out on her own time and did not want her medical information disclosed. She was informed that agreeing to the referral was a condition of her employment, and she ultimately signed the performance improvement plan. After the meeting, Ms. Scheer was given a referral form to fill out. The referral included authorizing a release of information that would allow SCL to be informed whether Ms. Scheer was making, canceling, missing, and attending appointments, and also whether she was complying with recommendations from her provider.

Ms. Scheer refused to sign this form, and after receiving notice, was placed on suspension. Over the next week, Ms. Scheer had multiple conversations with SCL, in which she was informed that failure to sign the form would result in her termination. On September 4, 2019, Ms. Scheer came to work, but because she still refused to sign the form, she was fired.

After exhausting her administrative remedies, Ms. Scheer filed this suit alleging four causes of action: (1) Discrimination under the ADAAA; (2) Retaliation under the ADAAA; (3) Discrimination under the Rehabilitation Act; and (4) Retaliation under the Rehabilitation Act. SCL now seeks summary judgment on all four claims.

In contrast to these undisputed facts, there are also clearly disputed facts. First and foremost, the parties dispute whether SCL perceived Ms. Scheer as having a disability. SCL claims that it did not, and Ms. Scheer

alleges that it did. The contents of Ms. Scheer's conversations with other SCL employees, and the feelings she expressed, are hotly disputed—Ms. Scheer denies having said anything that would lead someone to believe she was suicidal, or that she was, in fact, suicidal. Ms. Scheer characterizes the events leading to her dismissal as a bad game of "telephone" in which a message is passed from person to person, becoming less truthful with each communication, until the final result cannot be trusted.

But neither party disputes that the conversations occurred, or that Ms. Scheer's co-workers came away with concerns about her mental health and communicated these concerns to her supervisors. The parties also dispute the purpose of the mandatory referral. SCL claims it was meant to improve Ms. Scheer's performance and minimize workplace disruption. Ms. Scheer argues that this is nonsensical, and that the referral was unrelated to her productivity.

LEGAL STANDARDS

Under Federal Rule of Civil Procedure 56, a court should grant a motion for summary judgment "if but only if the evidence reveals no genuine issue of material fact and the movant is entitled to judgment as a matter of law." *MarkWest Hydrocarbon, Inc. v. Liberty Mut. Ins. Co.*, 558 F.3d 1184, 1190 (10th Cir. 2009). The court views "the facts and all reasonable inferences those facts support in the light most favorable" to the nonmoving party. *Id.* at 1189-90. An issue of material fact is genuine "only if the nonmovant presents facts such that a reasonable factfinder could find in favor of the nonmovant." *S.E.C. v. Thompson*, 732 F.3d 1151, 1157 (10th Cir. 2013) (alteration adopted).

"If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact . . . the court may . . . consider the fact undisputed for purposes of the motion." Fed. R. Civ.

P. 56(e)(2). Conclusory statements based merely on conjecture, speculation, or subjective belief, however, do not constitute competent summary judgment evidence. *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 875 (10th Cir. 2004). The nonmoving party must, instead, offer "specific facts that would be admissible in evidence in the event of trial, from which a rational trier of fact could find for the nonmovant." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998). That is, the party must provide "significantly probative evidence" supported by materials such as "affidavits, deposition transcripts, or specific exhibits incorporated therein" that would support a verdict in her favor. *Jaramillo v. Adams Cnty. Sch. Dist. 14*, 680 F.3d 1267, 1269 (10th Cir. 2012).

Plaintiff has brought claims under both the ADAAA and the Rehabilitation Act. Unless the ADA expressly states otherwise, these claims are analyzed under the same standards, and cases considering one are applicable to the other. *Rivero v. Bd. of Regents of Univ. of New Mexico*, 950 F.3d 754, 758 (10th Cir. 2020) (citing *Woodman v. Runyon*, 132 F.3d 1330, 1339 n.8 (10th Cir. 1997)).

DISCUSSION

SCL argues that Ms. Scheer's claims can be summarily rejected because plaintiff fails to support her prima facie case. To establish a claim of disability discrimination under the ADA, a plaintiff must prove she is "(1) is a disabled person as defined by the ADA; (2) is qualified, with or without reasonable accommodation, to perform the essential functions of the job held or desired; and (3) suffered discrimination by an employer or prospective employer because of that disability." *E.E.O.C. v. C.R. England, Inc.*, 644 F.3d 1028, 1038 (10th Cir. 2011) (quoting *Justice v. Crown Cork & Seal Co., Inc.*, 527 F.3d 1080, 1086 (10th Cir. 2008). SCL argues that Ms. Scheer's claims should also be analyzed under the *McDonnel Douglas* burden-shifting framework. *See*

McDonnel Douglas Corp. v. Green, 411 U.S. 792 (1973). Ms. Scheer argues that *McDonnel Douglas* is not applicable, because of the alleged evidence of direct discrimination in this case. *See Rakity v. Dillon Companies, Inc.*, 302 F.3d 1152, 1165 (10th Cir. 2002). But which of these two tests applies does not change the outcome of this case. Under either test, the actions taken by SCL do not qualify as discriminatory or retaliatory employment actions against Ms. Scheer, and she cannot prove her prima facie case. *See C.R. England, Inc.*, 644 F.3d at 1038 ("In order to demonstrate 'discrimination' a plaintiff generally must show that he has suffered an 'adverse employment action because of the disability'") (quoting *Mathews v. Denver Post,* 263 F.3d 1164, 1167 (10th Cir. 2001)).

"[T]he third element of the prima facie case . . . requires the plaintiff to come forth with evidence showing that the adverse employment decision was because of [her] disability." *Butler v. City of Prairie Village, Kan.*, 172 F.3d 736, 748 (10th Cir. 1999); see also 42 U.S.C. § 12102(3)(A) ("An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an *action prohibited under this chapter* . . .") (emphasis added). This is true of both discrimination and retaliation claims. *See Foster v. Mountain Coal Co.*, 830 F.3d 1178, 1186–87 (10th Cir. 2016). Adverse employment actions are those that cause a significant change in employment status, such as "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision that causes a significant change in benefits." *Burlington Indus., Inc., v. Ellerth*, 524 U.S. 742, 761 (1998); *Stinnett v. Safeway, Inc.*, 337 F.3d 1213, 1217 (10th Cir. 2003). Adverse employment actions are evaluated on a case-by-case basis. *Sanchez v. Denver Public Schools*, 164 F.3d 527, 532 (10th Cir. 1998).

Ms. Scheer's claims cannot succeed as a matter of law unless SCL took adverse employment actions against her, and those actions were "because of [her] disability." *Butler*, 172 F.3d at 748. An analysis of SCL's actions—issuing Ms. Scheer a performance improvement plan, requiring her to agree to a referral, and terminating her when she refused—shows that they do not meet these standards.

The performance improvement plan can be discounted as an adverse employment action off the bat. The Tenth Circuit has affirmed that performance improvement plans are not adverse employment actions. *Paige v. Donovan*, 511 F. App'x 729, 735 (10th Cir. 2013); *see Lujan v. Johanns*, 181 F. App'x 735, 737 (10th Cir. 2006). Nor does Ms. Scheer appear to argue that the performance improvement plan was discriminatory or adverse in nature, save for the appended mandatory referral.

But a mandatory referral to an employee assistance program has never been upheld as an adverse employment action. "[P]laintiff has not cited—and this Court has not found—a single case where a Court has held that referral to an EAP constitutes an adverse employment action." *Ndzerre v. Washington Metropolitan Area Transit Authority*, 275 F.Supp.3d 159, 166 (D.D.C. Aug. 16, 2017). "[T]he weight of authority indicates that referral to an EAP does *not* constitute an adverse employment action under Title VII." *Id.* (citing *Weaver v. City of Twinsburg*, 580 F.App'x. 386, 390–91 (6th Cir. 2014) ("Plaintiff fails to cite any case where a court found that an EAP was an adverse employment action."); *Delia v. Donahoe*, 862 F.Supp.2d 196, 212 (E.D.N.Y. 2012) ("[P]laintiff's referral on June 1, 1999 to EAP counseling does not constitute an adverse employment action as a matter of law."); *Waters v. Gen. Bd. of Global Ministries*, 769 F.Supp.2d 545, 558 (S.D.N.Y. 2011) ("[T]he issuance of a performance plan and the

recommendation that [plaintiff] attend EAP counseling sessions do not constitute adverse employment actions.")).

Granted, the referral here was mandatory. Ms. Scheer was told explicitly that agreeing to the referral was a condition of her employment. That pushes the needle closer to an adverse employment action, and I am sensitive to Ms. Scheer's argument describing the "difference between seeking counseling on own's own and being forced to go to counseling at someone else's order." Doc. 45 at 27. But she fails to provide even a single case supporting that position as a legal matter, or to adequately distinguish other cases involving mandatory referrals. *See e.g.*, *Ndzerre*, 275 F.Supp.3d at 166. And while SCL would have been informed, per the terms of the release, whether Ms. Scheer was attending her sessions and complying with treatment, there is no evidence that SCL would have had any knowledge of what that treatment entailed or exercised any control over its substance.[2] Furthermore, Ms. Scheer never disputed that she needed, or would benefit from, counseling. During her suspension, but before she was terminated, Ms. Scheer set up a self-referral and attended five counseling sessions. *Id.* at 12. Given the "unique factors relevant to the situation at hand," conditioning Ms. Scheer's employment on a referral she also independently sought out was not a significant change in employment status. *Sanchez*, 164 F.3d at 532.

[2] Plaintiff supplementally points the court to the Fourth Circuit's holding in *Hannah P. v. Haines*, 80 F.4th 236 (4th Cir. 2023), in which an employer received information from an employee's counselor through a mandatory referral and used that information against the employee to deny a promotion. The prospective possibility that this could have occurred had Ms. Scheer acquiesced to the mandatory referral, which is far from likely, is not enough to transform the condition into a significant change in employment status. Nor did the court in that case find the referral to be discriminatory or an adverse employment action.

Because the mandatory referral was not an adverse employment action, it follows that Ms. Scheer's termination for refusing to sign the release was predicated on her refusal to comply with that condition, and not "because of" a perceived disability. *See Jenkins v. Med. Labs. of E. Iowa, Inc.*, 880 F. Supp. 2d 946, 960 (N.D. Iowa 2012), *aff'd* 505 F. App'x 610 (8th Cir. 2013) (finding that where mandatory referral for conflict resolution counseling was not an adverse employment action, termination for failure to comply with the referral was not discrimination because of a disability); *see also* Doc. 45 at 12 (admitting that Ms. Scheer was terminated for refusing to sign the medical release form).[3]

Under any formulation of the test, Ms. Scheer's claims for discrimination and retaliation hinge on a showing that SCL took adverse employment action against her because of a disability or a perceived disability. She has not made this showing, and no disputed fact would change that conclusion. Her claims therefore fail as a matter of law.

[3] Ms. Scheer attempts to distinguish the medical release form she refused to sign from the mandatory referral itself. I do not find the distinction relevant, nor does Ms. Scheer assert her claims under 42 U.S.C. § 12112(d)(4), which prohibits requiring employees to undergo certain medical examinations or make certain medical disclosures.

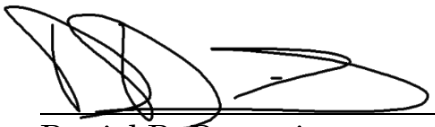
CONCLUSION

It is **ORDERED** that:

Defendants Motion for Summary Judgment, **Doc. 37**, is **GRANTED**; and the Clerk of Court is **DIRECTED** to close this case.

DATED: January 25, 2024

BY THE COURT:



Daniel D. Domenico
United States District Judge