# Varner v. Serco Inc

2017 | Cited 0 times | D. South Carolina | October 27, 2017

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

Marcius Varner, ) C/A 2:16-2340-DCN-BM

Plaintiff, )

v. ) REPORT AND RECOMMENDATION

SERCO, Inc., )

Defendant. ) _____)

This action has been filed by the Plaintiff, a former employee of the Defendant, asserting claims for discrimination in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, et seq. (First Cause of Action); for retaliation in violation of the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601, et seq. (Second Cause of Action); and for retaliation in violation of S.C. Code § 41-1-80 (Third Cause of Action). See Complaint.

The Defendant filed a motion for summary judgment pursuant to Rule 56, Fed.R.Civ.P., on July 14, 2017. Plaintiff filed a memorandum in opposition to the Defendant's motion on August 11, 2017, to which the Defendant filed a reply memorandum on August 18, 2017. Defendant's motion for summary judgment is now before the Court for disposition. 1

1 This case was automatically referred to the undersigned United States Magistrate Judge for all pretrial proceedings pursuant to the provisions of 28 U.S.C. § 636(b)(1)(A) and (B) and Local Rule 73.02(B)(2)(g), D.S.C. The Defendant has filed a motion for summary judgment. As this is a dispositive motion, this Report and Recommendation is entered for review by the Court.



Background and Evidence 2 Plaintiff worked for the Defendant pursuant to a government contract as

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a warehouse employee beginning in 2006. During his interview, Plaintiff acknowledged that the job required the ability to lift 50 pounds on a regular basis, and indicated that this would not be a problem. Rauchut Declaration, ¶ 4, Exhibit 1, ¶ 5; Plaintiff's Deposition, pp. 46-47. Melissa Ketron 3

testified that Plaintiff received a wage increase when he changed from warehouse worker to a supply technician in May 2007. Ketron Deposition, p. 25; see also Plaintiff's Exhibit C, p. 1. In 2008, Plaintiff was made Facility/Warehouse Supervisor for the Defendant's Spa Road facility. See Plaintiff's Exhibit C, pp. 2-3; Plaintiff's Deposition, pp. 73-74; B lazer Deposition, pp. 25-26.

Around 2010, Al Rauchut ("Rauchut") became the Program Manager in charge of the ATC Contract (a contract for maintenance and servicing of air traffic control towers on military bases throughout the United States) for the Charleston area. Rauchut Declaration, ¶¶ 3-4. In this position, he became Plaintiff's direct supervisor, working with him on a regular basis. Rauchut Declaration, ¶ 4. By the beginning of 2014, the Defendant knew it had lost the ATC contract, and had laid off dozens of employees due to the vast reduction in work. Rauchut Declaration, ¶¶ 8-9. However, Plaintiff was not among those laid off. Rather, the Defendant retained him as the only warehouse employee, and tasked him with clearing out the warehouse of any remaining government materials and unused tools and with disassembly of the material racks. Rauchut Declaration, ¶¶ 9,

2 The facts and evidence are considered and discussed herein in the light most favorable to the Plaintiff, the party opposing summary judgment. Pittman v. Nelms, 87 F.3d 116, 118 (4th Cir. 1996).

3 Ketron was as an employee in the Defendant's human resource department who serviced the Charleston area during part of Plaintiff's employment, but not at the time of his termination. Ketron Deposition, pp. 32, 34.



12. As shipments into and out of the warehouse slowed to nearly a halt in 2014, Plaintiff's job was to clear out what little was left in the Spa Road warehouse and as the Defendant prepared to relocate. Rauchut Declaration, ¶¶ 11, 13.

May 2014 was a period of uncertainty for the Defendant's remaining employees. Senior Program Director Mike Bechtel emailed Plaintiff on May 22, 2014, told him that toward the end of July/early August they would be down to very few hours, and invited him to "clean up [his] resume and send [it]" to Bechtel, who would in turn send it to the Defendant's Norfolk location for consideration for a position there given the bleak outlook in Charleston. Rauchut Declaration, ¶ 13 and Exhibit 3. However, Plaintiff had no desire to go to Virginia, so he did not send his resume to Bechtel. Plaintiff's Deposition, p. 121. Thereafter, on July 2, 2014, Plaintiff emailed Bechtel and said he was "try ing to get a feel for the last week of full-time hours," as his hours chart showed that "by the week of Aug. 1 st

[his] hours [would] drop." Plaintiff's Deposition, pp. 106-107. On July 8, 2014, Plaintiff was working alone in the warehouse. He was standing on a ladder when he was startled by a snake on top of one of the racks, and fell an estimated 10 to 12 feet to the ground, landing on his back. Plaintiff's Deposition, pp. 124-125; Rauchut Declaration, ¶ 14. Plaintiff dialed 911 and was rushed to the emergency room. He was given pain medication, told he had a spinal fracture, and released to go home that afternoon. Plaintiff's Deposition, pp. 128- 131, Exhibit B. Plaintiff was subsequently contacted by Kimberly McIntosh of York Risk Management, the Company the Defendant worked with to manage Worker's Compensation claims. Hart Declaration, ¶¶ 2, 4; Plaintiff's Deposition, p. 132. McIntosh sent Plaintiff to neurosurgeon Sabino D'Ag ostino ("Dr. D'Ag ostino") of Charleston Brain and Spine for evaluation. See Hart

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Declaration, ¶ 6. On July 18, 2014, Dr. D'Ag ostino placed Plaintiff on a 10-pound lifting restriction until his next appointment. Hart Declaration, ¶ 6, Exhibit 2. Dr. D'Ag ostino saw Plaintiff again on August 28, 2014, and increased his lifting restriction to 20 pounds with no ladders, effective until his next appointment. Hart Declaration, ¶ 7, Exhibit 3. When Dr. D'Ag ostino evaluated Plaintiff again on September 25, 2014, he again increased Plaintiff's lifting restriction, this time to 30 pounds. Hart Declaration, ¶ 7, Exhibit 4.

In the interim, Plaintiff had returned to work on July 29 with Dr. D' Agostino's restrictions. Rauchut Declaration, ¶ 14; Plaintiff's Deposition, p. 140. The Defendant accommodated Plaintiff's restrictions by giving him a computer-based assignment drafting a close- out report for all inventory purchased under the old contract. Rauchut Declaration, ¶ 16. By this time Plaintiff's hours had also been reduced due to the decrease in work that had been previously predicted, and he was only working Tuesdays and Thursdays - 16 hours each week. Rauchut Declaration, ¶ 14. Thereafter, from about July to November 2014, Plaintiff was certified for and used FMLA leave on an intermittent basis for flare-ups and other issues associated with his back injury. Magana Declaration, ¶ 3. Meanwhile, warehouse traffic continued to slow, and the Defendant moved out of the Spa Road warehouse and consolidated all of its operations in an office building on Bridgeview Drive while continuing its search for a different, smaller warehouse. Rauchut Deposition, p. 11.

Plaintiff continued to work for the Defendant during this time, with Rauchut receiving permission for Plaintiff to bill his work to "overhead" under the ATC Contract rather than lay him off while he was on Dr. D'Ag ostino's temporary restrictions. Rauchut Declaration, ¶ 11.

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Additionally, Rauchut convinced higher management to keep Plaintiff on full Defendant-paid benefits, such as health insurance, even though he was only working 16 hours per week - an amount well below the 30-hour per week requirement for Defendant-paid benefits. Rauchut Declaration, ¶ 11.

Rauchut thought Plaintiff was a good warehouseman who was worth keeping on in hopes that the Defendant would win other contracts in the future that would provide full-time work. Rauchut Declaration, ¶ 11.

In September of 2014, the Defendant found out it had been awarded subcontract work for the new prime contractor on the ATC contract (the "Subcontract"). Rauchut Declaration, ¶ 15, Exhibit 6. However, it would take several months of pre-planning and coordination with the government customer before procurement of materials and service and installation work on air traffic control towers would begin. Rauchut Declaration, ¶ 19. Therefore, it would be several months before warehouse traffic increased.

On January 15, 2015, Dr. D'Ag ostino evaluated Plaintiff for the final time. He directed Plaintiff to undergo a functional capacity evaluation (" FCE") to determine what his physical limitations were, and to determine what his permanent work restrictions would be. Rauchut Declaration, ¶ 17; Hart Declaration, ¶ 10; Plaintiff's Deposition, p. 163. The 30-pound lifting restriction remained in place pending the results of the FCE. The FCE took place on January 30, 2015, and the results were sent to Dr. D'Ag ostino, who reviewed them and, consistent with what the results showed, imposed a permanent 65-pound lifting restriction on the Plaintiff. Hart Declaration, ¶ 10, Exhibit 6; Rauchut Declaration, ¶ 17. The FCE results and resulting lifting restriction were sent to the Defendant on or around February 16, 2015. Hart Declaration, ¶ 10.

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When Plaintiff was released from Dr. D'Ag ostino's care in January 2015, the warehouse was not really operational and he was still only working Tuesdays and Thursdays. Rauchut Declaration, ¶ 18. Even so, he continued receiving full benefits, even though he was only working part-time. Rauchut Declaration, ¶ 14. However, the Defendant contends that they were glad to have him still employed, as they anticipated warehouse traffic would pick up in the coming months and Plaintiff's hours would increase accordingly. Hart Declaration, ¶ 11. Moreover, Plaintiff's 65-pound lifting restriction posed no problem, as the Defendant generally required its warehouse employees to be able to lift only 50 pounds on a regular basis. Blazer Deposition, pp. 20- 21; Rauchut Declaration, ¶ 17, Exhibit 1, ¶ 5; Hart Declaration, ¶ 11.

At some point in early 2015, the Defendant relocated from Bridgeview Drive to a small warehouse on Ashley Phosphate Road in North Charleston (the "Ashley Phosphate" warehouse). The Ashley Phosphate warehouse was substantially smaller than the Spa Road warehouse, being only 2,500 square feet. Rauchut Declaration, ¶ 12. 4

Due to the small size of the Ashley Phosphate warehouse, it was impractical to use fork lifts to place items on pallets, take items off pallets, or place items on shelves. Instead, pallet jacks were regularly used to transport items on pallets to a floor location in the warehouse, while placing the items on

shelves had to be done manually, by climbing a ladder and lifting the items onto the proper shelf. Additionally, items had to be prepared for shipping by placing them on pallets manually, which required warehousemen to physically lift the items. Rauchut Declaration, ¶ 22.

Into the spring of 2015, warehouse traffic remained slow as the Defendant was still

4 The Spa Road warehouse, where Plaintiff had been the supervisor, had been roughly 14,000 square feet. Rauchut Declaration, ¶ 7.

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in the preplanning stage of the Subcontract. Rauchut Deposition, p. 27. However, by May and June, work on the Subcontract was starting to pick up, and so were Plaintiff's hours. By June, Plaintiff was averaging around 30 hours per week. Rauchut Declaration, ¶ 19; Plaintiff's Deposition, pp. 162- 163. Rauchut testified that after things began to pick up in 2015 through 2016, that it was just crazy because of "[ j]ust so much stuff." Rauchut Deposition, p. 27.

In May 2015, Plaintiff's Worker's Compensation attorney sent him to Dr. Steven Poletti of the Southeastern Spine Institute for an independent medical evaluation (" IME" ). Plaintiff's Deposition, p. 191; Exhibit 16; Hart Declaration, ¶ 12. Dr. Poletti performed the IME on May 20, 2015, following which he imposed a permanent 35-pound lifting restriction on the Plaintiff. Hart Declaration, ¶ 12; Plaintiff's Deposition, p. 197 & Exhibit 16. Dr. Poletti's report, which is dated June 8, 2015, was forwarded to the Defendant on or around June 9, 2015. Plaintiff's Deposition Exhibit 16; see also Hart Declaration, ¶ 12. Rauchut attests that when he saw the 35-pound lifting restriction Dr. Poletti had imposed, he immediately suspended (but did not terminate) Plaintiff's employment, because such a restriction was well below what Rauchut thought was safe for a warehouse employee. Hart Declaration, ¶ 13; Rauchut Declaration, ¶¶ 20-23. Rauchut also communicated with the Defendant's Corporate Claims Manager Jena Hart and Human Resources Manager Francisco Magana about Plaintiff's situation. Hart Declaration, ¶ 14; Magana Declaration, ¶¶ 4-9. Hart asked Rauchut to evaluate the situation and determine if there were any accommodations that would allow Plaintiff to continue working in the warehouse with a 35-pound lifting restriction. Rauchut Declaration, ¶ 21. Rauchut attests that the ramp-up of activity in the warehouse under the Subcontract was expected to continue under this and future contracts, and the fact that the warehousemen at the Ashley Phosphate warehouse had to manually lift items on and off

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of pallets and climb ladders and place items on shelves meant that there was no way to accommodate Plaintiff's new lifting restriction in that many of the items that warehousemen had to lift were in excess of 35 pounds. Rauchut Declaration, ¶¶ 21-23. Therefore, Rauchut determined that there was simply no way to accommodate Plaintiff's 35-pound lifting restrictions. Rauchut Declaration, ¶ 21;

Magana Declaration, ¶ 8; Rauchut Deposition, pp. 33-34, 66. The Defendant then considered whether it could offer Plaintiff a transfer to an open position with the Defendant for which he met the minimum qualifications, but there were no such positions available. Magana Declaration, ¶ 8; Hart Declaration, ¶ 14.

Defendant contends that, after it was determined that no accommodations were available for Plaintiff' s 35-pound lifting restriction, termination was the only option. Magana Declaration, ¶ 9. Magana therefore gave the final approval to terminate Plaintiff's employment, after conferring with Hart. Magana Declaration, ¶ 8. Thus, on or around July 11, 2015, Program Director Steve Blazer called Plaintiff and informed him that his employment was terminated due to the Defendant's inability to accommodate his 35 pound lifting restriction. Plaintiff's Deposition, p. 183. Plaintiff testified the Defendant just wanted to get rid of him because he had pursued a Workers Compensation case against them, and that the 35 pound lifting restriction from Dr. Poletti was just the excuse they used to justify the decision. Plaintiff's Deposition, pp. 229-230; see also Plaintiff's Exhibit J [proposed release] and K [email inquiring whether Plaintiff should be terminated prior to a settlement being reached].

Discussion The Defendant has moved for summary judgment on all of Plaintiff's claims. Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to



interrogatories, and admissions on file, together with the affidavits, if any, 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. Rule 56, Fed.R.Civ.P. The moving party has the burden of proving that judgment on the pleadings is appropriate. Temkin v. Frederick County Comm'rs, 945 F.2d 716, 718 (4th Cir. 1991). Once the moving party makes this showing, however, the opposing party must respond to the motion with specific facts showing there is a genuine issue for trial. Baber v. Hosp. Corp. of Am., 977 F.2d 872, 874-75 (4th Cir. 1992).

Here, after careful review and consideration of the evidence and arguments presented, the undersigned finds for the reasons set forth hereinbelow that the Defendant is entitled to summary judgment on Plaintiff's ADA and FMLA claims, and that his remaining state law Workers Compensation retaliation claim should then be dismissed, without prejudice.

I. (ADA Claim) The ADA prohibits an employer from discriminating against a qualified individual on the basis of disability. 42 U.S.C. § 12112. In his First Cause of Action, Plaintiff directly alleges two ADA claims: 1) that he had a qualifying condition under the ADA and that he requested a reasonable accommodation for his condition, but that the Defendant failed to accommodate his disability; and 2) that the Defendant wrongfully terminated him on the basis of his disability. Complaint, ¶ ¶ 43-50. Plaintiff also references a separate ADA retaliation claim; Id., at 49; 5

although

5 Since retaliation is a wholly separate and distinct claim, Plaintiff should have been set forth any ADA retaliation claim in a separate cause of action. Cf. Williams v. Little Rock Mun. Water Works, 21 F.3d 218, 222–223 (8th Cir.1994) [Noting that a discrimination claim is separate and

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Plaintiff does not specifically argue an ADA retaliation claim in his brief. See Plaintiff's Brief, pp. 8-10. The undersigned has addressed each of these claims in turn.

Failure to Accommodate The ADA makes it unlawful for an employer to fail to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an . . . employee . . . ." 42 U.S.C. § 12112(b)(5)(A). To establish a prima facie case of failure to accommodate under the ADA, Plaintiff must show that (1) he is an individual who has a disability within the meaning of the statute; (2) the Defendant had notice of his disability; (3) with reasonable accommodation he could perform the essential functions of his position; and (4) the Defendant refused to make such accommodations. See Reyazuddin v. Montgomery County, Maryland, 789 F.3d 407, 414-416 (4 th

Cir. 2015); Wilson v. Dollar General Corp., 717 F.3d 337, 345 (4 th

Cir. 2013); Donaldson v. Clover School District, No. 15-1768, 2017 WL 4173596 at * 3 (D.S.C. Sept. 21, 2017). For purposes of this claim only, Defendant does not contest that Plaintiff is a person with a disability 6

and that it had notice of Plaintiff's disability. See Defendant's Memorandum in Support of Summary Judgment, pp. 13-14 & n. 4. Rather, Defendant argues that Plaintiff has failed to present evidence sufficient to establish the third and fourth elements of his accommodation prima facie case.

5 (...continued) distinct from a claim of retaliation]. However, as the Defendant addressed this claim it in its motion for summary judgment, Plaintiff's failure to separately state this claim in his Complaint is not a basis for dismissal of this claim. See also Brooks v Ross, 578 F.3d 574, 581 (7 th

Cir. 2009) [Plaintiff only required to provide sufficient notice to the Defendant of the basis of Plaintiff's claim] .

6 Defendant does dispute, however, that Plaintiff is a "qualified person with a disability" under the ADA. See discussion on wrongful termination claim, infra.

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With respect to the third element, Plaintiff initially makes two assertions: first, that he could perform the essential functions of his position even without an accommodation, and second, that he was fired for accommodations he never requested. With regard to Plaintiff's contention that he could perform the essential functions of his job, Plaintiff argues that by virtue of his promotions, his job over the years had evolved to involve less lifting and more paperwork. Plaintiff's Deposition, p. 165. As noted, the evidence before the Court shows that prior to the Defendant's slowdown in 2014 due to the loss of the ATC Contract, Plaintiff had been made the facility/warehouse supervisor for the Defendant's 14,000 square foot Spa Road facility. See Plaintiff's Exhibit C, pp. 2-3. Plaintiff further testified that even after Defendant's loss of the ATC contract and the closing of the Spa Road facility, when he came back to work after suffering his injury (which was July 29, 2014) he only did paperwork even when his lifting restrictions were lowered except for some shipping of small packages or similar items. Plaintiff's Deposition, pp. 167-168.

However, while there may have been times when Plaintiff was not required to lift as frequently or as much as he did originally, Plaintiff has presented no evidence (such as written job descriptions or statements by supervisors or management) to show that the requirement of having to lift up to fifty pounds did not remain an essential function of Plaintiff's job. Even if Plaintiff was not having to lift as much when he was a supervisor, he has presented no evidence to show that the standard lifting requirement still did not apply to this job (which was still a warehouse job), and in any event the evidence shows that the Spa Road facility (where Plaintiff had been the supervisor) closed in late 2014 due to loss of business. Plaintiff thereafter remained employed (although on only



a part-time basis), even though other employees were laid off, 7

because Rauchut thought Plaintiff was a good warehouseman who was worth keeping on in hopes that business would pick up. Rauchut Declaration, ¶ 11. Further, Plaintiff's later placement on lighter duty computer work drafting a "close-out" report for inventory following his accident was only a temporary accommodation for him while he recovered from his injury. Rauchut Declaration, ¶ 16. However, Plaintiff was cleared to lift up to 65 pounds by January 2015, and Rauchut testified that thereafter, particularly from the beginning of 2015 through the date Plaintiff was terminated, the volume of work and shipments into the warehouse increased due to the new subcontract they were awarded, and that by June 2015 Plaintiff was back to working about 30 hours per week. Rauchut Deposition, p. 27; Rauchut Declaration, ¶ 19.

Therefore, while Plaintiff's duties prior to his accident are relevant, the evidence shows that his duties changed due to the loss of the ATC Contract, as well that Plaintiff's assignment to do computer work was a temporary measure while Plaintiff was recuperating from his injury. The fact that the Defendant had initially accommodated Plaintiff's (original) lower lifting restrictions imposed by Dr. D'Ag ostino 8

does not negate the evidence of what Plaintiff's regular job requirements were, which Plaintiff had himself acknowledged when he was hired. Plaintiff's

7 When Plaintiff started working for the Defendant, he estimated that there may have been close to one hundred employees working in Charleston. Plaintiff's Deposition, p. 57. However, when the Defendant started downsizing, about 85-90 employees were laid off due to lack of work at the facility. Plaintiff's Deposition, p. 221.

8 As previously noted, immediately following his injury, Dr. D'Ag ostino limited Plaintiff to lifting 10 pounds, gradually thereafter increasing his lifting ability to 20 and then 30 pounds, before finally releasing him with a 65 pound requirement. Hart Declaration, ¶ ¶ 6-7, 10. The Defendant accommodated Plaintiff's initial reduced lifting capacities by temporarily assigning him to do computer work. Rauchut Declaration. ¶ 16.

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Deposition, pp. 46-47; see also Rauchut Declaration, ¶ 4, Exhibit 1, ¶ 5. As the Fourth Circuit has held,

In determining whether a responsibility is an essential function of a job, we look to the general components of the job rather than to the employee's particular experience. That an employee may typically be assigned to only certain tasks of a multifaceted job "does not necessarily mean that those tasks to which [ ]he was not assigned are not essential" . . . Even though [the plaintiff in that case] worked primarily in the copy room, [ ]he could have, at any time, been called upon to move heavy furniture or carry heavy packages. EEOC v. Womble Carlye Sandridge & Rice, LLP, 616 Fed.Appx. 588, 594 (4 th

Cir. 2015). Therefore, while due to various reasons (such as loss of work or temporary accommodations for Dr. D'Ag ostino's initial lifting restrictions) Plaintiff may not have been regularly lifting over 35 pounds in the period before or after his injury, he has not shown that having to lift in excess of that amount was not an essential function of his job, or that he did not need to have the ability to lift over 35 pounds as part of his regular job. See also Lucarelli v. Conrail, No. 98-5904, 2002 U.S. Dist. LEXIS 12201, at * 29 (E.D.Pa. Mar. 26, 2002) ["I n determining what job functions are essential to a particular position, consideration is given to the employer's judg ment"] .

Moreover, the evidence also shows that after the Defendant moved to the Ashley Phosphate Road facility in early 2015, the small size of that facility prevented the use of fork lifts, and that physically lifting items for moving and for placement on and off of shelves was routinely required. Rauchut Declaration, ¶¶ 12, 22. While Blazer could not say day to day whether Plaintiff had to lift items weighing more than 50 pounds during this time, he testified that he would have been required to lift whatever came in through FedEx or for deliveries. Blazer Deposition, p. 21. Rauchut attests that the shipments in and out of the Ashley Phosphate facility steadily increased starting around May 2015,

and that many of the items coming through the warehouse on a frequent basis

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were substantially heavier than 35 pounds, such as ladders, power tools, tool boxes, cable reels, steel channel strut, aluminum and steel panels, and fabricated assemblies, all of which would have required manual lifting by warehouse employees. Rauchut Declaration, ¶¶ 19, 22-23. Plaintiff has not presented any evidence to contest that the Defendant's volume of work and shipments increased after it received the new contract. Rather, Plaintiff argues that he was able to perform his duties at the warehouse from January 2015 through June 2015, when he was suspended, and therefore did not need an accommodation. However, it is undisputed that during that period of time Plaintiff's medical restriction allowed him to lift up to 65 pounds, a restriction that posed no problem as the Defendant generally only required its warehouse employees to have the ability to lift 50 pounds on a regular basis. Blazer Deposition, pp. 20-21; Rauchut Declaration, ¶ 17, Exhibit 1; Hart Declaration, ¶ 11; see also Rauchut Declaration, Exhibit 1, ¶ 5. However, the evidence (even considered in the light most favorable to the Plaintiff) does not support Plaintiff's claim that he could continue to perform the essential functions of his job without an accommodation once he had a lifting restriction of only 35 pounds imposed by his physician. Rather, an accommodation would have been required at that time.

With regard to accommodation, Plaintiff makes two alternative arguments. First, he continues to argue that he did not need or request an accommodation for a 35 pound lifting restriction. Second, he contends that even if there was a need for him to have an accommodation for a 35 pound lifting restriction, the Defendant could have accommodated him by allowing others to assist him when lifting heavier items was required, or by allowing him to use machinery to assist in the lifting of those heavier items. However, neither of these arguments is supported by evidence sufficient to avoid summary judgment.

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Plaintiff's first contention is that since he never requested an accommodation for a 35 pound lifting restriction, the Defendant did not have a duty to accommodate in the absence of any request for accommodation. Cf. Gwendolyn Jarrett v. Retzer Group, Inc., No. 14-744, 2015 WL 9581875 at * 3 (E.D.Ark. Dec. 30, 2015) ["I f an employee does not make a request for accommodation, then the employer has no duty to accommodate." ] (citing Ballard v. Rubin, 284 F.3d 957, 960 (8 th

Cir. 2002)); see also Godlove v. Martinsburg Senior Towers, LP, No. 14-132, 2015 WL 1809325 at * 4 (4 th

Cir. Apr. 21, 2015) ["A reasonable accommodation claim requires proof of such a specific request."] . However, in this case a physician who Plaintiff chose to have evaluate him put the Defendant on notice that the maximum weight he was able to lift was 35 pounds. Although Plaintiff argues that he

did not request an additional accommodation beyond the 65 pound lifting restriction imposed by Dr. D'Ag ostino, Plaintiff does not dispute that Dr. Poletti, the physician who Plaintiff went to see as part of his worker's compensation claim ag ainst the Defendant, imposed a lower 35 pound lifting restriction on him, and that Dr. Poletti's findings were sent to the Defendant as part of that claim. Plaintiff's Deposition, p. 191; Exhibit 16; Hart Declaration, ¶ 12. As such, the Defendant was entitled to rely on the work restrictions received from Dr. Poletti in assessing whether Plaintiff could perform the essential functions of his job, either with of without an accommodation for these restrictions. Wulff v. Sentara Healthcare, Inc., 513 Fed.Appx. 267, 269, n. 2 (4 th

Cir. 2013); Alexander v. Northland, Inn, 321 F.3d 723, 727 (8 th

Cir. 2013)[Finding that the employer " was entitled to rely and act upon the written advice from [the employee's] physician that unambiguously and permanently restricted her from vacuuming. In this situation, the employee's belief or opinion

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that she can do the function is simply irrelevant."] . 9

As for whether a reasonable accommodation existed once Plaintiff's lifting capacity was determined to be only 35 pounds, the evidence shows that while prior to the move to the new warehouse employees could use forklifts to assist with lifting heavier items, that due to the small size of the new Ashley Phosphate warehouse, it was impractical to use fork lifts to place items on pallets, take items off pallets, or place items on shelves, which all had to be done by hand. Rauchut Declaration, ¶ 22. Plaintiff has again provided no evidence to dispute this evidence, and has therefore not shown that forklifts were a viable accommodation for him in the new warehouse. 10 While Plaintiff also argues that the Defendant could have required other employees to handle the lifting of heavier items, all warehouse employees were required to have the ability to lift up to 50 pounds on a regular basis. Rauchut Declaration, ¶ ¶ 17, 19, Exhibit 1; Hart Declaration, ¶ 11; Rauchut Deposition, p. 27; Blazer Deposition, pp. 20-21. Plaintiff's contention that having other

9 Plaintiff readily admits in his brief that Dr. Poletti's 35 pound lifting restriction was only obtained for his Workers Compensation claim, to use as a basis for arguing for or obtaining a bigger settlement. Plaintiff's Brief, p. 5. As such, Plaintiff has essentially been "hoisted on his own petard" by his apparent failure to consider how that strategy could adversely effect his job. Plaintiff cannot argue that he had a lifting restriction of 35 pounds for purposes of his Workers Compensation claim, but then argue that his real lifting restriction was 65 pounds in order to meet the work requirements of his job. As noted by Dr. D'Ag ostino, Plaintiff obtaining a lifting restriction of 65 pounds from one doctor and a lifting restriction of 35 pounds from another doctor put the Defendant in a "toug h spot", because neither opinion carries more weight than the other. D'Ag ostino Deposition, pp. 23-24. Hence, by obtaining the new opinion from Dr. Poletti "in an effort to settle his Workers'

Compensation case for more money", Plaintiff placed the Defendant in a "Catch-22" situation, because if it did not follow Dr. Poletti's more limiting restriction, it could be liable for not following Plaintiff's doctor's workplace restrictions. See D'Ag ostino Deposition, p. 25.

10 This also would not have changed the fact that the Defendant's warehouse positions still had a 50 pound lifting requirement, even at warehouses where forklifts were used. Rauchut Declaration, Exhibit 1, ¶ 5.

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employees do his lifting for him would have been a reasonable accommodation is without merit. Irving v. Chester Water Authority, No. 08-5156, 2010 WL 2512370, at * 5 (E.D.Pa. June 17, 2010) ["Employ ers] are not required to shift responsibilities to other employees in order to comply with the reasonable accommodation requirement"]; cf. Lombardo v. Air Products & Chems., Inc., No. 05-1120, 2006 U. S. Dist. LEXIS 46077, at * 38 (E.D.Pa. July 7, 2006) [Finding that lifting was an essential function of the warehouse positions occupied by the plaintiff, and that reassigning those tasks to other employees was not required as a reasonable accommodation under the ADA]; Lucarelli v Conrail, 2002 U. S. Dist. LEXIS 12201, at * 29 ["Employ ers are not . . . required to assign existing employees . . . to perform the essential functions of an employee's job which he . . . cannot perform because of an impairment"] ; see also Hall v United States Postal Service, 857 F.2d 1073, 1078 (6 th Cir. 1988) ["An accommodation that eliminates an essential function of the job is not reasonable"] .

Finally, Plaintiff testified that the Defendant never had anyone offer to sit down with him individually, or with him and his attorney, and try to come up with accommodations that were suitable to both the Defendant and him so he could continue in his job. Plaintiff's Deposition, p. 230. "The ADA imposes upon employers a good faith duty to engage with their employee in an interactive process to identify a reasonable accommodation." Clark v. Sch. Dist. Five of Lexington & Richland Ctys., 247 F. Supp. 3d 734 (D.S.C. 2017)(quoting Jacobs v. North Carolina Administrative Office of Courts, 780 F.3d 562, 581 (4 th

Cir. 2015)). However, the interactive process "is not an end in itself; rather it is a means for determining what reasonable accommodations are available to allow a disabled individual to perform the essential job functions of the position sought." Wilson v. Dollar Gen. Corp., 717 F.3d 337, 347 (4th Cir. 2013). "L iability for failure to engage in an interactive process depends on a finding that, had a good faith interactive process occurred, the parties could have found a reasonable accommodation that would enable the disabled person to perform the job's essential functions." Id. An

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employee must demonstrate that the employer's " failure to engage in the interactive process resulted in the failure to identify an appropriate accommodation for the disabled employee." Crabill [v.

Charlotte Macklenburg Bd. of Educ.], 423 Fed.Appx. [314], 323 [4 th

Cir. 2011]. Clark, 247 F. Supp.3d 734 at * 9 (D.S.C. 2017).

Here, the Defendant argues there is no basis to impose liability on this ground because even if the parties had engaged in an interactive process, there was no reasonable accommodation that would have enabled Plaintiff to perform the job's essential functions. See Wilson, 717 F.3d at 347. Plaintiff' s own arguments confirm Defendant's contention, as his proffered potential reasonable accommodation was to have other employees do the job when heavier items needed lifting. However, as previously discussed, every employee at the warehouse had a 50 pound lifting requirement, and Plaintiff's contention that the Defendant could have required other employees to do Plaintiff's work for him when his lifting restriction prevented him from doing so, particularly considering the lack in the number of employees in this location, is not a reasonable accommodation. Blazer Deposition, p. 46. See Irving, 2010 WL 2512370, at n. 2; cf. Lombardo, 2006 U. S. Dist. LEXIS 46077, at * 38 [Finding that lifting was an essential function of the warehouse positions occupied by the plaintiff, and that reassigning those tasks to other employees was not required as a reasonable accommodation under the ADA]; Lucarelli, 2002 U. S. Dist. LEXIS 12201, at * 29 ["Employ ers are not . . . required to assign existing employees . . . to perform the essential functions of an employee's job which he . . . cannot perform because of an impairment"] . The evidence also reflects that due to the size of the new warehouse, Plaintiff's other proffered accommodation of allowing him to use forklifts was not feasible. Rauchut Declaration, ¶¶ 21-23. Again, the Plaintiff has offered no evidence to counter or overcome the Defendant's evidence on this issue. Further, the

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evidence shows the Defendant even considered whether Plaintiff could be moved to another position for which he was qualified, but that none existed. Magana Declaration, ¶ 8; Hart Declaration, ¶ 4.

In sum, Plaintiff has failed to establish his prima facie case of failure to accommodate under the ADA, because he has failed to present evidence sufficient create a genuine issue of fact that he could perform the essential functions of his job as existed at the time he was terminated, or that the Defendant failed to accommodate him with a reasonable accommodation. Cf. Howell v Holland, No. 13-295, 2015 WL 751590, at * 19 (D.S.C. Feb. 23, 2015; Telfair v. Federal Express Corp., 934 F.Supp. 2d 1368, 1383-1384 (S.D.Fla. 2013); Irving, 2010 WL 2512370, at * 5. Therefore, Plaintiff's ADA accommodation claim is without merit, and the Defendant is entitled to summary judgment on this claim.

Termination Plaintiff also alleges an ADA wrongful discharge claim. In order to establish his prima facie case of wrongful discharge in violation of the ADA, Plaintiff must by a preponderance of the evidence show four criteria: first, he must be a qualified person with a disability; second, he must have been discharged; third, he must have been fulfilling his employer's legitimate expectations at

the time of discharge; and fourth, the circumstances of his discharge must raise a reasonable inference of unlawful discrimination. Acosta v. Hilton Grand Vacations Company, LLC, No. 15- 495, 2017 WL 1173583, at * 10 (D.S.C. Mar. 30, 2017); Rohan v. Networks Presentations, LLC, 375 F.3d 266, 272 n. 9 (4 th

Cir. 2004); Haulbrook v. Michelin N. Am., Inc., 252 F.3d 696, 702 (4 th

Cir. 2001); Taylor v. Ameristeel Corp., 155 Fed.Appx. 85, 89 (4 th

Cir. Nov. 18, 2005); Haneke v. Mid- Atlantic Capital Management, 131 Fed.Appx. 399, 400 (4 th

Cir. May 10, 2005); see also Anderson

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v. Roche Carolina, Inc., No. 10-2792, 2012 WL 368710, at * 6 (D.S.C. Feb. 3, 2012). 11

Defendant argues that Plaintiff cannot show even the first of these four criteria; i.e., that he is a "qualified person with a disability" within the meaning of the ADA, thereby entitling the Defendant to dismissal of this claim. The undersigned is constrained to agree.

The term "disability" is defined as, a) a physical or mental impairment that substantially limits one or more of the major life activities of an individual, b) a record of such impairment, or c) being regarded as having such an impairment. 42 U.S.C. § 12102(1); see Acosta, 2017 WL 1173583, at * 10; Pollard v. High's of Baltimore, Inc., 281 F.3d 462, 467 (4 th

Cir. 2002). 12 A "major life activity" is defined as a basic activity that an average person can perform with little or no difficulty, such as walking, hearing, speaking, learning, breathing, standing, lifting, seeing and working. Appendix to 29 C.F.R. § 1630.2(I); see Bruncko v. Mercy Hosp., 260 F.3d 939, 941 (8th Cir. 2001); Dutcher v. Ingalls Shipbuilding, 53 F.3d 723-727, n. 7 (5th Cir. 1995); Gupton v.

11 The Defendant must also be subject to suit under the ADA. 42 U.S.C. § § 12111(2)(5), 12112(a). Defendant does not contest that it is an entity subject to suit under the ADA.

12 While Pollard and some of the other cases cited herein and from prior to 2009, Congress made substantial changes to the ADA through the ADA Amendments Act of 2008 ("ADAAA"), which had an effective date of January 1, 2009. " The ADAAA was intended to clarify congressional intent with respect to the original ADA, as well as to overturn certain United States Supreme Court cases that had narrowed the ADA's scope;" Ryan v. Columbus Regional Healthcare System, Inc., No. 10-234, 2012 WL 1230234 at * 3 (E.D.N.C. Apr. 12, 2012); and under the ADAAA, "[ t]he definition of disability . . . shall be construed in favor of broad coverage of individuals . . . , to the maximum extent permitted

by the terms of this chapter." 42 U.S.C. § 12102(4)(A). Further, "[ t]he primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA." 29 C.F.R. § 1630.1 (2011). Since Plaintiff lost his job in July 2015, these amendments apply to his ADA claim. Therefore, although some of the cases cited herein relating to general ADA definitions pre-date 2009, the undersigned has nonetheless considered Plaintiff's claim pursuant to the ADAAA's enhanced standard.

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Virginia, 14 F.3d 203, 205 (4th Cir. 1994), cert. denied, 513 U.S. 810 (1994) ( Rehabilitation Act). 13 Major life activities also include caring for oneself, eating, concentrating, thinking, and sleeping. See 42 U.S.C. § 12102(2)(A). As for the "reg arded as" component for disability ,

[p]rior to Congress' passage of the ADA Amendment Act of 2008, Pub. L. No. 110–325, § 2(b)(1)-(6), 122 Stat. 3553 (2008) ("ADAAA"), there were two ways in which a person could be regarded as being disabled: "(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities."Sutton v. United Air Lines, Inc., 527 U.S. 471, 489, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999). However, with the passage of the ADAAA, which became effective January 1, 2009 and overruled Sutton," [a]n 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 because of an actual or perceived . . . impairment whether or not the impairment limits or is perceived to limit a major life activity." 42 U.S.C. §12102(3)(A). Mohney v. Pennsylvania, 809 F.Supp.2d 384, 400 n. 14 (W.D.Pa. 2011).

While Plaintiff argues that he can establish this claim because the Defendant "reg arded him" as having a disability, that argument does not help him establish his claim, as the Defendant does not contest that Plaintiff has a "disability " for purposes of its motion for summary judgment. See Defendant's Brief, pp. 18-19; Reply Brief, p. 7. That is not, however, a sufficient basis on which to allow this claim to proceed, as the question is not whether he has a disability, but whether the evidence shows him to be a "qualified individual with a disability". Acosta, 2017 1173583, at * 10. A " qualified person with a disability " is someone who, with or without a reasonable accommodation, can perform the essential functions of the position in question. See 42

13 See Hooven-Lewis v. Caldera, 249 F.3d 259, 268 (4th Cir. 2001) [same standards apply to ADA and Rehabilitation Act]; Smaw v. Commonwealth of Virginia Department of State Police, 862 F.Supp. 1469, 1474 (E.D.Va. 1994) [same].

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U.S.C. A. § 12111(8); Tyndall v. National Education Centers, Inc. of California, 31 F.3d 209, 213 (4th

Cir. 1994). Since Plaintiff has not submitted evidence sufficient to establish that he could perform his job's essential functions either with or without a reasonable accommodation; see discussion, supra; he has not established a genuine issue of fact as to whether he is a "quali fied person with a disability" for purposes of his discharge claim. See 42 U.S.C. § 12111(8). Therefore, as Plaintiff has failed to establish all the elements of his prima facie case, his discharge claim is subject to summary judgment.

ADA Retaliation Claim To the extent Plaintiff had intended to assert a claim of retaliation under the ADA, it falls under § 503(a) of the ADA, 42 U.S.C. § 12203(a), which provides as follows: 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.

Retaliation cases under the ADA are subject to the same requirements of proof as are applicable to Title VII disparate treatment claims. Ross v. Communications Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985); see also Williams v. Cerberonics, Inc., 871 F.2d 452, 457 (4th Cir. 1989). The employee is initially required to establish a prima facie case of retaliation by a preponderance of the evidence. Such a prima facie case consists of three elements: (1) the employee engaged in protected activity; (2) the employer took adverse employment action against the employee; and (3) a causal connection exists between the protected activity and the adverse action. Reynolds v. American Nat'l Red Cross, 701 F.3d 143, 154 (4 th

Cir. 2012)[ADA claim]; Freilich v. Upper Chesapeake Health, Inc Co., 313 F.3d 205, 216 (4th Cir. 2005); Harmer v. Virginia Elec. and Power



Co., 831 F.Supp. 1300, 1308 (E.D.Va. 1993). Once a prima facie case has been presented, the Defendant employer has the burden of producing a legitimate, non-discriminatory reason for its actions. If the employer can produce a legitimate, non-discriminatory reason for its actions, the employee must then demonstrate that the Defendant's proffered reason is pretextural. Harmer, 831 F.Supp. at 1308; see also Graves v. Bank of America, 54 F.Supp.3d 434, 443 (M.D.N.C. 2014).

With respect to his prima facie case, the Defendant has argued that even assuming Plaintiff can "demonstrate that requesting an accommodation is protected activity and that he suffered an adverse action by being terminated, [Plaintiff] has no evidence to establish the causal connection between the two events, which is necessary for his prima facie case." See Defendant's Memorandum in Support of Summary Judgment, p. 21. However, while the Defendant has addressed Plaintiff's claim based on a request for accommodation being his protected activity, Plaintiff argues in his brief that his having

filed for Worker's Compensation benefits was his protected activity. Specifically, Plaintiff asserts that he was "terminat ed shortly after . . . the resolution of his workers' compensation case. The timing of the discriminatory acts is sufficient to carry Plaintiff's burden of the element of causation." See Plaintiff's Memorandum in Opposition to Summary Judgment, p. 9. That is not a basis for an ADA retaliation claim. While being retaliated against for filing a workers compensation claim could constitute a cause of action under state law, and indeed Plaintiff has asserted a state law claim for retaliation based on his having filed his workers compensation claim, it does not constitute "prot ected activity" under the ADA. See 42 U.S.C.A. § 12203(a)[" No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter . . . "] ; Fleury v. New York City Transit Authority, No. 02-5266, 2004 WL 2810107 at * 5 (E.D.N.Y. Dec. 8, 2004)[Filing a worker's



compensation claim does not constitute protected activity under the ADA], rev'd in part on other grounds, 160 Fed. Appx. 34 (2d Cir. Dec. 15 2005); Cf. Jimenez v. Potter, No. 06-50104, 2006 WL 3821527, at * 1 (5th Cir. Dec. 22, 2006); Rodriguez v. Beechmont Bus Serv., Inc, 173 F.Supp. 2d 139, 150 (S.D.N.Y. 2001)[complaints about job safety under OSHA are not protected activity under Title VII], vacated on other grounds, 162 F.3d 1147 (2d Cir. 1998).

Therefore, Plaintiff having failed to establish an essential element of his ADA retaliation claim, this claim must be dismissed. Dowe v. Total Action Against Poverty in Roanoke, 145 F.3d 653, 657 (4 th

Cir. 1998)[Plaintiff must proffer evidence sufficient to create a genuine issue of fact that his employer " [took] the adverse employment action[s] because [he] engaged in a protected activity."] ; Cf. Rudolph v. Hechinger, 884 F.Supp. 184, 188 (D.Md. 1995) ["Title VII (does) not protect against unfair business decisions - only against decisions motivated by unlawful animus"] , citing Turner v. Texas Instruments, Inc., 555 F.2d 1251, 1257 (5th Cir. 1977); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) ["Rule 56(c) mandates the entry of summary judgment... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."] .

II. (FMLA Retaliation Claim) In his Second Cause of Action asserted under the FMLA, Plaintiff alleges that he is a qualified employee under the FMLA, that he requested FMLA leave, and that his discipline/discharge was a result of his having requested such leave. See generally, Complaint, ¶ ¶ 51-57.

The FMLA provides for twelve (12) weeks of unpaid leave per year for eligible



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employees. An "elig ible employee" under the Act is an employee who has been employed for at least twelve (12) months by the employer with respect to whom leave is requested, and for at least one thousand two hundred and fifty (1,250) hours of service with such employer during the previous twelve (12) month period. 29 U.S.C. § 2611(2)(A). The Defendants do not dispute that Plaintiff qualifies as an "elig ible employee" under this standard. As such, Plaintiff was entitled to take reasonable leave for medical and other reasons in a manner that accommodated the legitimate interests of his employer. 29 U.S.C. § 2612. See Taylor v. Progress Energy, Inc., 493 F.3d 454, 457 (4 th

Cir. 2007)[Under the FMLA, an employee has a "rig ht to take a certain amount of unpaid medical leave each year and the right to reinstatement following such leave."] .

The FMLA creates two types of claims: "(1) interference claims, in which an employee asserts that his employer denied or otherwise interfered with his substantiative rights under the Act; and (2) retaliation claims, in which an employee asserts that his employer discriminated against him because he engaged in activity protected by the Act". Carr v. Mike Reichenbach Ford Lincoln, Inc., No. 11-2240, 2013 WL 1282105 at *6 (D.S.C. Mar. 26, 2013)(quoting Gleaton v. Monumental Life Ins. Co., 719 F.Supp.2d 623, 633, n. 3 (D.S.C. 2010)); Sommer v. The Vanguard Group, 461 F.3d 397, 399 (3 rd

Cir. 2006). As set forth in his Complaint, Plaintiff asserts an FMLA retaliation claim in this lawsuit. 14

14 To the extent that Plaintiff has attempted for the first time in his response in opposition to summary judgment to argue or raise an FMLA interference claim, no such claim was pled in his Complaint, and it is therefore not properly before the Court. See Mother Doe 203 v. Berkeley County School Dist., No. 14-3575, 2016 WL 6627900 at * 4 (D.S.C. Nov. 9, 2016)(citing Harris v. Reston Hosp. Center, LLC, 523 Fed.Appx. 938, 946 (4 th

Cir. 2013)[affirming district court's refusal to consider a new legal argument plaintiff raised at summary judgment stage because "asserting a new legal theory for the first time in opposing summary judgment amounted to constructive amendment

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Plaintiff must prove three elements in order to establish a prima facie case of retaliation under the FMLA: (1) he engaged in protected activity; (2) the Defendant took an adverse employment action against him; and (3) there is a causal connection between the two events. Adams v. Anne Arundel County Public Schools, 789 F.3d 422, 429 (4 th

Cir. 2015). Once a prima facie case has been presented, the Defendant employer has the burden of producing a legitimate, non- discriminatory reason for its actions. If the employer can produce a legitimate, non-discriminatory reason for its actions, the employee must then demonstrate that the

Defendant's proffered reason is pretextural. Adams, 789 F.3d at 429.

Here, the Defendant does not dispute that Plaintiff engaged in protected activity by requesting FMLA leave. As for the other two criteria, Plaintiff alleges in his Complaint that Rauchut would not allow him to return to full time hours in retaliation for his having taken FMLA leave. See Complaint, ¶ 22. Plaintiff further alleges in his Complaint that the Defendant's discipline against him and his discharge were in retaliation for him taking FMLA leave. See Complaint, ¶ 55. Finally, Plaintiff testified at his deposition that as a result of his taking FMLA leave, Rauchut would no longer talk to him and communicated with him only through email when he returned from FMLA leave. Plaintiff's Deposition, pp. 208-211.

Initially, although not contesting that Plaintiff's reduction in hours and termination could be considered adverse employment actions for purposes of an FMLA claim, Defendant argues

14 (...continued) of the amended complaint and thus unfairly prejudiced the defendant."] ; United States ex rel. DRC, Inc. v. Custer Battles, LLC, 472 F. Supp. 2d 787, 795–96 (E.D. Va. 2007) [declining to analyze new theory that plaintiffs first asserted in opposition to summary judgment motion, as doing so "after the close of discovery...would seriously undermine the fairness of the litigation and unfairly prejudice the defendants"] , aff'd, 562 F.3d 295 (4th Cir. 2009).)

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that Plaintiff's testimony regarding Rauchut's failure to verbally communicate with him is not "an adverse employment action" under the FMLA, and the undersigned agrees. There is no evidence that Rauchut having stopped verbally communicating Plaintiff's assignments to him and instead emailing them, or in general treating Plaintiff " differently" (Plaintiff's allegations assumed to be true for purposes of summary judgment), adversely affected his employment or his pay and benefits. As such, Plaintiff has not shown that these allegations rise to the level of an "adverse action" for purposes of his FMLA retaliation claim. Cf. Adams, 789 F.3d at 429 (4 th

Cir. 2015)[Finding neither verbal reprimands or a reprimand letter were adverse employment actions because they "did not adversely affect [plaintiff's] employment position or his pay and benefits."] .

With respect to Plaintiff's other two asserted adverse employment actions, Defendant argues that Plaintiff has failed to show a causal connection between his request for FMLA leave and his reduction in hours. The evidence reflects that Plaintiff intermittently used FMLA leave from the time of his injury in July until November 2014. Magana Declaration, ¶ 3. When Plaintiff returned to work for the first time since his accident in late July, he was scheduled to only work 2 days a week, Tuesdays and Thursdays. Rauchut Declaration, ¶ 14, 18. However, Rauchut attests that this reduction in hours was because of the lack of work at that time, and even Plaintiff admitted that prior to his injury his hours were already scheduled to drop significantly by August 1. Plaintiff's Deposition, pp.

106-107. The evidence also shows that Plaintiff was one of the few employees who was retained by the Defendant even while other employees were being laid off, notwithstanding the Defendant's significant loss of business, as well as that his hours were subsequently increased when the Defendant's work began to increase due to its new contract. See discussion, supra. This evidence does not present an issue of fact that any reduction in Plaintiff's work hours was out of

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retaliation for his having taken FMLA leave. See 29 C.F.R. § 825.216(a)["An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period."] ; cf. Yashennko v. Harrah's NC Casino Co., LLC, 446 F.3d 541, 548 (5 th

Cir. 2006)[Under the FMLA, "an employer may deny restoration when it can show that it would have discharged the employee in any event regardless of leave"] . As for Plaintiff's discharge, the evidence shows that even though Plaintiff's FMLA leave period ended in November 2014, Plaintiff continued to work for the Defendant thereafter, and that by the spring of 2015 his hours had even begun to increase as the work for the new contract started coming in. Magana Declaration, ¶ 3; Plaintiff's Deposition, pp. 162-163. Moreover, Plaintiff was not terminated until July 2015. Plaintiff's Deposition, p. 183. This was eight months after Plaintiff last requested FMLA leave, with his termination coming only after the Defendant was notified of Plaintiff's additional lifting restriction by his physician. 15

Plaintiff has presented no evidence to show that his termination in July 2015 was causally connected to his requests to take FMLA leave in 2014. Cf. Ranade v. BT Americas, Inc., 581 Fed.Appx. 182, 183 (4 th

Cir. 2014)[Noting that the nearly six-month gap between Plaintiff' s FMLA leave and her termination undermined her claim that the two events were connected.].

15 Plaintiff also argues that his termination may have been because other employees resented him due to his FMLA leave, and cites to Blazer's deposition testimony to support this claim. However, Blazer testified that while he was aware that other employees would sometimes have to be pulled off their jobs to do something because Plaintiff was not there, he did not recall any resentment towards the Plaintiff. Blazer Deposition, pp. 47, 48. In any event, any such "coverag e" by other employees on account of Plaintiff being absent would have ceased at least eight months before Plaintiff was discharged.

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Therefore, Plaintiff's F MLA retaliation claim is without merit.

III. (Remaining State Law Claim) Finally, Plaintiff raises a state law claim for wrongful termination for filing a worker's compensation claim and for going to another doctor in addition to the company doctor. See Complaint, ¶¶ 59-61. The Defendant has addressed this state law claim in its brief and urges this Court to grant summary judgment on this claim. However, if the Court adopts the recommendation set forth herein with regard to Plaintiff's federal claims, this pendant state law claim will be the only claim remaining in this lawsuit, and when federal claims presented in a case are dismissed, any remaining state law claims should ordinarily also be dismissed, without prejudice, in order to allow for state court resolution of such claims under the general doctrine developed in United Mine Workers v. Gibbs, 383 U.S. 715 (1966). See In Re Conklin, 946 F.2d 306, 324 (4th Cir. 1991); Nicol v. Imagematrix, Inc., 767 F.Supp. 744, 746, 749 (E.D.Va. 1991); Mills v. Leath, 709 F.Supp. 671, 675-676 (D.S.C. 1988) [noting that federal courts should generally decline to exercise pendent jurisdiction over remaining state law claim after dismissal of federal claims in a lawsuit]; Carnegie-Mellon v. Cohill, 484 U.S. 343 (1988); Taylor v. Waters, 81 F.3d 429, 437 (4th Cir. 1996).

This doctrine recognizes the state court's role in determining whether summary judgment on a state law claim is warranted; Gibbs, 383 U.S. at 726 ["Certainly , if the federal claims are dismissed before trial, . . . the state claims should be dismissed as well"] ; Carnegie-Mellon, 484 U.S. at 350, n. 7 ["[ I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine . . . will point toward declining to exercise jurisdiction over the remaining state law claims." ]; and dismissal of this

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remaining state law claim, without prejudice, will allow the Plaintiff to obtain a ruling as to the viability of this state law claim from a more appropriate forum. Further, if this claim was to survive summary judgment, it would be much more appropriate for it to be tried in state court. Lee v. Singleton, No. 11–2983, 2012 WL 1896062 at **18–20 (D.S.C. Jan.9, 2012) [dismissing and remanding unrelated state law claims where they were not related to a federal claim], adopted by, 2012 WL 1895998 (D.S.C. May 24, 2012); see also Singh v. New York State Dep't of Taxation & Finance, No. 06–299, 2011 WL 3273465 at ** 20–21 (W .D.N.Y. July 28, 2011), adopted by, 865 F.Supp.2d 344 (W.D.N.Y. Oct.25, 2011).

Dismissal of this state law claim would also not prejudice the Plaintiff, as the parties could seek a fast track for resolution of this claim at the state level; See Rule 40(c), S.C.R.Civ.P.; and there are no statute of limitations problems because federal law provides for tolling of statutes of limitation for state claims during the period they were pending in federal court and for thirty days afterwards. See 28 U.S.C.A. § 1367(d); Jinks v. Richland County, 538 U.S. 456 (2003); Hedges v. Musco, et al., 204 F.3d 109, 123–124 (3rd Cir.2000); Beck v. Prupis, 162 F.3d 1090, 1099–1100 (11th Cir.1998) ["a dismissal under section 1367 tolls the statute of limitations on the dismissed claims for 30 days"] ; cf. National Federation of Independent Business v. Sebelius, 567 U.S. ___, ___, 132 S.Ct. 2566, 2592 (2012). 16

16 A case related to the interpretation of § 1367 is currently before the United States Supreme Court; see Artis v. District of Columbia, No. 16-940; but the issue before the Supreme Court in that case concerns how to calculate the grace period set forth in § 1367, not whether the initial 30 day filing period applies. See 2015 WL 10891465 (D.C. Aug. 2015), cert. granted, 137 S.Ct. 1202 (2017).

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Conclusion Based on the foregoing, it is recommended that the Defendant's motion for summary judgment be granted with respect to Plaintiff's ADA claims (First Cause of Action) and FMLA claim (Second Cause of Action), and that those claims be dismissed, with prejudice. Plaintiff's remaining state law cause of action should then be dismissed, without prejudice, in order to allow Plaintiff to pursue this claim in state court, if he desires to do so.

The parties are referred to the Notice Page attached hereto.

_____ Bristow Marchant United States Magistrate Judge October 27, 2017 Charleston, South Carolina

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Notice of Right to File Objections to Report and Recommendation The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[ I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310 (4 th

Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); see Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk United States District Court

Post Office Box 835 Charleston, South Carolina 29402 Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984).

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