FILED WITH THE COURT

OCT 10 2012

PREPARED BY THE COURT

John E. Harrington, J.S.C.

	:	SUPERIOR COURT OF NEW JERSEY
Gail D. Owens,	:	BURLINGTON COUNTY
Plaintiff,	:	LAW DIVISION
v.	:	
The New Jersey Department of the Treasury; John Does 1-10, fictitious persons or entities, jointly, severally and alternatively,	:	DOCKET NO. BUR-L-3799-08
	:	**ORDER**
Defendant.	:	
	:	Dated: October 10, 2012

THIS MATTER comes before this Court by way of two motions: (1) Defendant's motion for summary judgment on Count One (NJLAD claim); and (2) Plaintiff's cross motion for summary judgment on liability as to Count One and to hold Defendant in contempt and impose sanctions.

IT IS ON THIS 10th day of October, 2012 hereby ORDERED as follows:

1. Both parties' motions for summary judgment are **DENIED** as to liability pursuant to the NJLAD because there remain genuine issues of material fact.

2. Defendant's motion to dismiss Plaintiff's claim for punitive damages is **DENIED without prejudice** pending the conclusion of trial.

3. Plaintiff's motion to hold Defendant in contempt and to impose sanctions is **DENIED**, as the September 6, 2012 Order contained a clerical mistake. Pursuant to R. 1:13-1, the clerical mistake in the September 6, 2012 Order is hereby amended to list October 17, 2012 as the deadline for the production of Dr. Alan Miller's documents. If Defendant fails to provide these documents, Plaintiff may move to dismiss Defendant's pleading and impose sanctions pursuant to R. 4:23-2.

Hon. John E. Harrington, J.S.C.

JOHN E. HARRINGTON, J.S.C.

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I. STATEMENT OF FACTS

This employment discrimination case arises out of Plaintiff's claims that her employer, the New Jersey Department of the Treasury ("Defendant" or "Treasury"), failed to reasonably accommodate her in violation of the New Jersey Law Against Discrimination. ("NJLAD"). Plaintiff also alleges that Defendant fraudulently and negligently concealed evidence, namely voice recordings of phone calls that should have been preserved. However, the claims for concealment of evidence have been withdrawn. The only claim remaining is for compensatory and punitive damages under the NJLAD.

Plaintiff commenced her employment with Defendant in 1999 and remains employed at the Treasury in the Retirement Section of the Division of Pension and Benefits. Over the course of her employment, Plaintiff held the following positions in chronological order: Technical Assistant 3 in the Division of Pensions and Benefits, Pensions Benefits Specialist Trainee, Pension Benefit Specialist 3 and Pension Benefits Specialist 2 (current position). Prior to her employment with Defendant, Plaintiff had experience with health benefits and terminology through her employment with Helene Fuld Medical Center. Throughout Plaintiff's employment

with the Treasury, her primary job duty was that of a telephone counselor, which entailed answering approximately 100 telephone calls per day from State employees with questions about benefit plans. As a Pension Benefit Specialist, speaking on the phone was Plaintiff's primary duty. When she was not on the phone, Plaintiff completed retirement estimates.

A. Disciplinary Action Of Plaintiff

On April 13, 2006, Plaintiff submitted medical documentation to Defendant requesting that she be approved for FMLA leave for a lung condition. Rita Partyka ("Partyka"), the Chief of Client Services, sent the following email in reply to this request:

> [Plaintiff], I just spoke with Chris Possessky – the medical documentation that was submitted on 4/13/06 was in fact altered. You have until business tomorrow 4/26/06 to provide documentation substantiating the discussion with your physician. If this is not received by close of business on 4/26/06 we will be recommending disciplinary action to be taken. Thank you.

At her deposition, Plaintiff stated that she explained to Partyka that the note was not fraudulent because her doctor had made mistakes. Plaintiff stated that she had corrected the mistakes on the note to accurately reflect her health issues and the date. Thereafter, Plaintiff's doctor explained the alterations to Defendant, and, as a result, Defendant decided to cease pursuing disciplinary action against Plaintiff any further. In the email declining pursuit of disciplinary action, Possessky concluded: "I hope this is the last time we need to discuss [Plaintiff], but I am afraid my hope will not be realized."

B. First Request For Accommodations

On June 8, 2006, Plaintiff sent an email to her supervisor informing that she would be submitting a doctor's note requesting an accommodation that would allow her to be placed in a non-speaking position to relieve her laryngitis. Plaintiff's manager forwarded the email to eight individuals, including Loretta DeBonis ("DeBonis"), Assistant Chief of Client Services, who responded: "Have you already seen this? So what does she think we can have her do for 3 days? I say we have her stay home."

On June 9, 2006 Plaintiff submitted medical documentation stating that she was suffering from laryngitis and was restricted from speaking on the phone for a period of approximately three weeks, until June 30, 2006. Accordingly, Plaintiff requested a non-speaking position. Partyka responded that she was unable to remove Plaintiff from the phones at that time. Partyka explained at her deposition that she did not contact other departments to search for work for Plaintiff because Defendant was attempting to accommodate Plaintiff within the area to which she was assigned (i.e., the call center). Partyka testified that she did not consider placing Plaintiff in an hourly position elsewhere because there was a training curve, which would not be practical for a temporary three-week position. Partyka testified that she did not contact the publication department for an opening for Plaintiff because Plaintiff's resume and work history was not in that area. The only non-speaking duty within the call center was doing retirement estimates, and DeBonis told Partyka that there was only enough of this work to last a week and a half.

Deborahnn Westwood ("Westwood"), the HR Manager, approved a leave of absence for Plaintiff under the FMLA as a reasonable accommodation from June 12, 2006 through June 29, 2006. Westwood provided a letter indicating that the three-week restriction could not otherwise be accommodated with non-telephone related worked based on the specialized work Plaintiff performed. At her deposition, Westwood stated that she did not make any further inquiries into accommodations for Plaintiff because she relied upon the information provided by Partyka.

On June 12, 2006, Plaintiff sent a letter to Westwood in HR and Fred Beaver ("Beaver"), Director of Pensions, formally complaining about Defendant's refusal to accommodate her, detailing the positions that were available, and listing the accommodations that could have been made.

Plaintiff contends that she had the knowledge and experience necessary to perform the functions of a department known as "Leisure Town," which is a section in the Department of Pensions whose positions are generally given to part-time, retired Pensions employees. Individuals in this position respond to written inquiries from State employees seeking information regarding their pension benefits. The position does not require telephone usage. The training for "Leisure Town" would have taken two weeks.

Prior to the conclusion of her FMLA leave, on June 19, 2006, Plaintiff submitted medical documentation that stated she was able to return to work on June 20, 2006. Partyka was notified that Plaintiff returned to work on June 20, 2006, and Partyka responded by email to Lorie Haggerty, a manager in the HR Leave Management Unit: "This lady is going to be the death of me yet. . ."

Plaintiff spoke with her union about Defendant's alleged failure to accommodate, and the union attempted to schedule a meeting with Defendant to address this issue. When Plaintiff returned to work, the managers for Defendant debated whether the meeting with the union was still necessary. In an email, Chris Possessky ("Possessky"), Employee Relations Coordinator in HR, stated:

> If [Plaintiff] makes it through the day without complaining, then there is no need for a meeting and it will be cancelled. If she begins to have a problem and complains, then we will meet.

In response to Possessky's email, Partyka requested to cancel the union meeting because Plaintiff's doctor had advised that Plaintiff was able to perform her regular duties. Accordingly, the union meeting was cancelled.

One week later, on June 27, 2006, Plaintiff sent a letter to Douglas Ianni ("Ianni"), HR Officer, requesting a reassignment due to negative treatment from management and the mishandling of her accommodation requests. On July 12, 2006, Plaintiff followed up with Ianni to confirm that he had received her request. Ianni responded in the affirmative and stated that he "hopefully will address it very shortly." However, Ianni never addressed the request as he believed that it would "blow over."

Between July 2006 and December 2006, Plaintiff complained twice to Hattie Smith ("Smith"), Defendant's EEO/AA Officer, about the refusal of a reasonable accommodation. It

was Smith's job to investigate claims of discrimination, but she did not investigate Plaintiff's complaint. Smith testified that she could not recall the reasons why she did not investigate Plaintiff's complaint. On November 9, 2006, Plaintiff filed a discrimination complaint with the Division of Civil Rights, alleging that Defendant failed to accommodate her disability.

B. Second Request For Accommodations

On or around November 15, 2006 Plaintiff submitted medical documentation stating that she was restricted from speaking on the telephone for a period of approximately three weeks, until December 11, 2006 because of "hoarseness." Defendant was able to provide Plaintiff with non-telephone related work through November 24, 2006. Hank Schwedes ("Schwedes"), one of Plaintiff's supervisors, does not recall if anyone looked outside the call center to accommodate Plaintiff. On November 24, 2006, Plaintiff was placed on an unpaid leave of absence with an expected return date of December 11, 2006, per her doctor's instructions.

C. Third Request For Accommodations

On or around December 8, 2006, Plaintiff submitted medical documentation stating that she could not return to work until she was transferred to a "non-talking" job because of her hoarseness. In a correspondence, dated December 19, 2006, Westwood stated that there were no jobs that did not require any talking and extended Plaintiff's leave of absence through January 22, 2007. Westwood also indicated that HR would engage in a dialogue with Plaintiff's doctor to clarify her medical prognosis and the need for accommodations. On January 3, 2011, Plaintiff filed a Verified Complaint with the Division of Civil Rights against Defendant alleging violations of the NJLAD.

In an email dated January 5, 2012, Ianni discussed a reassignment for Plaintiff:

> Pensions is not going to be happy to reassign her, but given they have vacancies, they will be hard-pressed to convince us they can't accommodate her reassignment request. . . Expect Fred [Beaver] to come calling after our 1/8/07 meeting with him. However, we are bound by ADA law to make a reasonable accommodation. Reassignment to a position they need filled, even if they personally don't like the woman, is in accordance with the law.

On January 9, 2006, Westwood sent a letter to Plaintiff requesting documentation from her doctor specifying her limitations regarding speech. Plaintiff's doctor followed up with a January 15, 2007 letter, stating:

> [Plaintiff] has a voice disorder which requires voice rest. She should not be a phone counselor. She is under speech therapy and should not be working in any capacity where constant talking is her primary function. This request is indefinite since it is dependent on her treatment and recovery. If possible she should be transferred to a department that would comply with this medical restriction.

Plaintiff returned to work on January 23, 2007 and was transferred to the Retirement Section of the Treasury's Division of Pensions and Benefits, where she was not required to speak as a primary job duty. Plaintiff's new duties include processing retirement estimates in the

computer system and processing manual retirement estimates. Plaintiff remains employed in the Retirement Section of the Treasury's Division of Pensions and Benefits to the present day.

D. Law Division Complaint

On May 11, 2010, Plaintiff filed an Amended Complaint, alleging the following: (Count One) violation of the NJLAD, including compensatory and punitive damages; (Count Two) fraudulent concealment and destruction of evidence; and (Count Three) destruction of evidence.

Regarding damages, Plaintiff alleges that she lost $8,490.96 (based upon an annual salary of $44,153) from November 27, 2006 through January 23, 2007. As a result of the allegedly forced unpaid leave, Plaintiff contends that she missed six two-week pay periods of pension eligibility, causing her anniversary date to be pushed back twelve weeks.

Counts Two and Three are not at issue in the present motions, as Plaintiff has decided to withdraw these claims. Plaintiff had requested voice recordings created during her employment that Defendant has not produced. During Plaintiff's employment as a telephone counselor, Defendant used a system to record calls. However, in 2009, as this system reached its storage capacity, it began recording over older calls in the system. Defendant is unable to produce the calls requested by Plaintiff because they no longer exist.

II. LEGAL DISCUSSION

A. Summary Judgment Standard.

Summary judgment should be granted "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 challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). In determining whether summary judgment is appropriate, the motion judge must view all factual evidence in a light most favorable to the non-moving party. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995). Under this standard, the non-moving party is given the benefit of all reasonable inferences the facts will support. Miller v. Estate of Walter Sperling, 326 N.J. Super. 576-77 (App. Div. 1999). Summary judgment is appropriate only where the court finds that the evidence presented is insufficient to allow a rational fact finder to resolve the dispute in favor of the non-moving party. Piccone v. Stiles, 329 N.J. 191, 194-95 (App. Div. 2000).

B. Count One - Failure to Accommodate Under the NJLAD

The NJLAD, N.J.S.A. §§ 10:5-1 to -49, prohibits employment discrimination on the basis of a disability. Potente v. County of Hudson, 187 N.J. 103, 110 (2006). The NJLAD and its implementing regulations require an employer to make a reasonable accommodation to the limitations of an employee with a disability, unless it would impose undue hardship on business operations or where it can reasonably be determined that the employee, as a result of the employee's disability, cannot perform the essential function of the job even with a reasonable accommodation. Id.

> An employer's duty to accommodate extends only so far as necessary to allow a disabled employee to perform the essential functions of his job. It does not require acquiescence to the employee's every demand. If an employer reasonably determines that an employee because of handicap cannot presently perform the job even with an accommodation, then the employer need not attempt reasonable accommodation.

Tynan v. Vicinage 13 of Superior Court of N.J., 351 N.J. Super. 385, 397 (App. Div. 2002). An employer is not required to reallocate essential functions of a job to other employees. 29 C.F.R. 1630.2; see Ensslin v. Township of North Bergen, 275 N.J. Super. 352, 366 (App. Div. 1994) ("With respect to the duty to accommodate a handicapped employee, . . . [a]ccommodation is not reasonable if it either imposes undue financial and administrative burdens on a grantee or requires a fundamental alteration in the nature of the program. . . Neither a fundamental alteration in the nature of the job, nor the elimination of an essential job function is a reasonable accommodation"). Pursuant to N.J.A.C. § 13:13-2.5(b), leaves of absence are an accepted form of accommodation available to all employers.

"All employment discrimination claims require the plaintiff to bear the burden of proving the elements of a *prima facie* case." Victor v. State, 203 N.J. 383, 408 (2010). Under the NJLAD, a plaintiff must establish the following three elements in order to establish a *prima facie* case of failure to accommodate: (1) the plaintiff was handicapped or disabled within the meaning of the statute; (2) the plaintiff was qualified to perform the essential functions of the position of employment, with or without accommodation; and (3) the plaintiff suffered an adverse employment action because of the handicap or disability. Victor v. State of New Jersey, 401 N.J. Super. 596, 609 (App. Div. 2008), aff'd, 203 N.J. 383 (2010).

In this matter, Plaintiff contends that a failure to accommodate under the NJLAD does not include adverse employment action as an element of a *prima facie* case. In Victor v. State, 203 N.J. 383 (2010), the Supreme Court specifically addressed the issue of "whether the LAD's failure to accommodate cause of action includes adverse employment consequences as one of the elements of the *prima facie* case." Id. at 407. The Supreme Court stated that "[p]ublished decisions of New Jersey courts uniformly identify adverse employment consequences as one element of the prima facie case for disability discrimination," but ultimately failed to resolve this issue because the facts were not appropriate. Id. at 413, 422. However, the Victor court engaged in a lengthy discussion about the current and future state of the law regard this issue.

The Victor court recognized two decisions in which New Jersey courts suggest that adverse employment was not needed as a *prima facie* element for failure to accommodate: (1) Seiden v. Marina Assoc., 315 N.J. Super. 451, 465-66 (Law Div. 1998); and (2) Tynan v. Vicinage 13 of the Superior Court of N.J., 351 N.J. Super. 385, 400-01 (App. Div. 2002). In support of her position, Plaintiff relies upon Tynan, which held that New Jersey courts have developed an independent test to determine whether an employer has failed to provide accommodations:

> To show that an employer failed to participate in the interactive process, a disabled employee must demonstrate: (1) the employer knew about the employee's disability; (2) the employee requested accommodations or assistance for her disability; (3) the employer did not make a good faith effort to assist the

> employee in seeking accommodations; and (4) the employee could have been reasonably accommodated but for the employer's lack of good faith.

Tynan, 351 N.J. Super. at 400-01. Plaintiff contends that these four elements constitute a *prima facie* case in a failure to accommodate action. The Tynan court explained that this interactive process is to be used when analyzing "what appropriate accommodation is necessary" in a specific circumstance. Tynan, supra, 351 N.J. Super. at 400.

The Victor court explained that "the court's opinion in Tynan has given rise to the suggestion that the *prima facie* case does not include [adverse employment action] at all." Victor, 203 N.J. at 415. As a result of the confusion stemming from the possibility of two standards, the Victor court recognized that there are circumstances in which adverse employment action is not necessary for a *prima facie* showing of a failure to accommodate under the broad purpose of the NJLAD to protect disabled people in the workplace. Victor, 203 at 420-21.

> The LAD's purposes suggest that we chart a course to permit plaintiffs to proceed against employers who have failed to reasonably accommodate their disabilities or who have failed to engage in an interactive process even if they can point to no adverse employment consequence that resulted. Such cases would be unusual, if not rare, for it will ordinarily be true that a disabled employee who has been unsuccessful in securing an accommodation will indeed suffer an adverse employment consequence.
>
> That is, the disabled employee who is denied a requested reasonable accommodation necessary to perform the job's essential functions will generally, as a result, not be hired or promoted, or will be discharged. Indeed, it is difficult for us to envision factual circumstances in which the failure to accommodate will not yield an adverse consequence. But there may be individuals with disabilities who request reasonable accommodations, whose requests are not addressed or are denied, and who continue nonetheless to toil on.

Id. at 421. Despite the recognition of a possible *prima facie* claim of failure to accommodate without a showing of adverse employment action, the Supreme Court failed to resolve this issue because the facts were not appropriate.

> In spite of our recognition that the broad remedial sweep of out LAD demands vigilance in our protection of the rights of persons with disabilities, and as compelling as their plight is in facing workplace challenges that are uniquely theirs, we are constrained to refrain from resolving today the question of whether a failure to accommodate unaccompanied by an adverse employment consequence may be actionable.

Id. at 422.

Accordingly, in the present matter, although the Supreme Court recognized the possibility of an unusual case where adverse employment action has not occurred, the Court is restricted to the three-part test listed above, including adverse employment action as an element of a *prima facie* case of failure to accommodate under the NJLAD.

> The proofs necessary to demonstrate an 'adverse employment action' must be examined on a case-by-case basis. . . [A]n employer's adverse employment action must rise above something that makes an employee unhappy, resentful or otherwise cause an incidental workplace dissatisfaction. Clearly, actions that affect wages, benefits, or result in a direct economic harm qualify. So too, noneconomic actions that cause a significant, non-temporary adverse change in employment status or the terms and conditions of employment would suffice.

Victor, 401 N.J. Super. At 616.

Once a plaintiff has established a *prima facie* showing of discrimination, the Court must apply one of two tests to determine whether unlawful discrimination has occurred: the McDonnell Douglas (or "pretext") test and the Price Waterhouse (or "mixed motive") test. In a pretext case, after making a *prima facie* showing of discrimination, employment discrimination claims proceed in accordance with the McDonnell Douglas burden-shifting test. Victor, 203 N.J. at 408. The first step in that analysis requires the plaintiff to demonstrate that he/she can meet each of the elements of the *prima facie* case. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). After the plaintiff demonstrates a *prima facie* case of discrimination, the burden shifts to the defendant to demonstrate a legitimate, nondiscriminatory business reason for the employment decision. Id. If the employer meets its burden, the burden shifts again and the plaintiff is required to demonstrate that the reason proffered by the defendant is a mere pretext for discrimination. Id.

If there is direct evidence of discrimination, the claims proceed pursuant to the Price Waterhouse or mixed-motive test. Fleming v. Correctional Healthcare Solutions, Inc., 164 N.J. 90, 100 (2000). If the employee does not produce direct evidence of discrimination, the employer must then produce evidence sufficient to show that it would have made the same decision if illegal bias had played no role in the employment decision. Id.

There are two categories of disability discrimination: disparate treatment and the failure to reasonably accommodate an employee's known disability. Tynan, 351 N.J. Super. at 397. "The gravamen of a disparate treatment claim is that employees who are not disabled are treated more favorably than a disabled employee. In other words, the employee with the disability has been discriminated against by reason of such disparate treatment." Seiden v. Marina Assocs., 315 N.J. Super. 451, 459 (Law Div. 1998). To establish a disparate treatment claim on the basis of a disability, New Jersey courts have adopted the McDonnell Douglas test. Viscik v. Fowler Equip. Co., 173 N.J. 1, 13 (2002). However, if "the employer denies an employee an opportunity to continue with employment because the employee suffers from a disability that could reasonably be accommodated, but is not, regardless of how other employees are treated, that in itself is an unlawful employment practice and a violation of the LAD," and analysis under the McDonnell Douglas test is unnecessary. Seiden, 315 N.J. Super. at 461.

1. *Prima Facie* Showing Of Discrimination

Defendant moves for summary judgment and argues that Plaintiff fails to establish a prima facie case for disability discrimination because (a) Plaintiff has failed to show that she was qualified to perform the essential functions of her job with or without reasonable accommodations and (b) there was no adverse employment action taken against her.

a. Prong Two – Essential Functions Of The Job

First, Defendant contends that Plaintiff cannot satisfy the second prong of a *prima facie* case of discrimination under the NJLAD because she has failed to show that she was qualified to perform the essential functions of her position, with or without reasonable accommodation. Defendant states that Plaintiff's primary job duty was that of a telephone counselor, which entailed answering about 100 telephone calls per day and up to seven hours per day (or 93% of her workday speaking on the telephone). As such, Defendant argues that talking on the phone was an essential function of her job which, based on the medical notes and her deposition testimony, she was not qualified to perform. The medical documentation from her doctor, dated January 15, 2007, restricted her from talking on the phone: "She is under speech therapy and should not be working in any capacity where constant talking is her primary function." Additionally, Defendant points out that Plaintiff testified that she was not able to perform all, or even most, of the essential functions of her job in June or November of 2006. Defendant argues that, when an employee is unable to perform all of the essential functions of his/her job, even with requested accommodation, he/she is not "qualified" and does not meet the second prong of a denial-of-accommodation claim. Victor, supra, 203 N.J. at 423; see also, Hennessey v. Winslow Township, 368 N.J. Super. 443, 452 (App. Div. 2004) ("An employer need not attempt accommodation if it reasonably determines that an employee because of handicap cannot presently perform the job even with an accommodation").

In support, Defendant cites Ensslin v. Township of North Bergen, 275 N.J. Super. 352 (App. Div. 1994), wherein the plaintiff, a former police officer, filed a NJLAD claim against his employer. In that case, the plaintiff was injured in a skiing accident that rendered him a paraplegic. Id. at 357. Subsequently, he was terminated because he could no longer perform his duties of apprehending and securing suspects and prisoners, and there were no clerical or administrative positions available to accommodate his disability. Id. In dismissing the complaint, the court stated:

> [A] handicapped police officer must, with reasonable accommodation, be capable of performing all of the essential functions of the job for which he was hired, not merely one or two essential tasks, and . . . the employer need not accommodate the officer by eliminating one or more of the essential functions of the job.

Id. at 366 (citing Matos v. City of Phoenix, 176 Ariz. 125 (Ariz. App. 1993). Here, Defendant asserts that Plaintiff's admission that she was unable to perform all of the essential functions of her regular job eliminates Defendant's burden to provide her with a reasonable accommodation, as the purpose of such an accommodation is to allow the employee to perform the job in which they are employed.

In further support, Defendant cites Raspa v. Office of Sheriff, 191 N.J. 323 (2007), wherein the plaintiff corrections officer was diagnosed with Graves opthalmopathy, an eye disease which caused bulging eyes and possible double vision. Id. at 328. The plaintiff's treating doctor recommended that he "not supervise inmates" to minimize the risk of possible eye trauma due to his illness. Id. The court found that the supervision of inmates was an essential function of a corrections officer and that the plaintiff's inability to supervise inmates due to his disability rendered him unqualified for the job. Id. at 338-39. The Court held that "the LAD does not require that an employer create an indefinite light duty position for a permanently

disabled employee if the employee's disability, absent a reasonable accommodation, renders him otherwise unqualified for a full-time, full-duty position." Id. at 340-41. The Court further explained: "An employer may, consistent with the LAD, terminate the employer of an employee who, after consideration of available reasonable accommodations, nevertheless is no longer able to perform the essential functions of his job." Id. at 341.

In the present matter, Defendant argues that Plaintiff was unable to do the essential functions of her job when she submitted medical documentation stating that she was permanently precluded from working in a position which had speaking as a primary duty. Defendant contends that, at that point, it was under no obligation to accommodate Plaintiff or to continue her employment.

In opposition, Plaintiff argues that Defendant's argument regarding the ability to perform the essential job functions is factually and legally incorrect. Plaintiff states that speaking was not an essential function of her job as a Pension Benefit Specialist 2, which is defined by the Civil Service Commission as follows:

> Under the supervision of the Chief of an administrative bureau or other supervisory officer in the Division of Pensions and Benefits, Department of the Treasury acts as lead worker in a retirement, health benefits, or other employee benefits program of the Division; or conducts field instructional seminars on retirement health benefits or other employee benefits programs of the Division or, reviews, processes and/or responds to retirement, health benefits or other employee benefit requests and inquiries involving complicated eligibility determinations and/or performs complex computations; does other related duties.

Plaintiff contends that her position required her to be able to perform a variety of tasks related to benefits calculations, other than fielding constant telephone calls. Plaintiff also alleges that there are many Pension Benefit Specialists throughout the Treasury that perform functions other than fielding calls. Even assuming that her only job function was to field calls, despite her vocal ailments, Plaintiff states that she was still able to perform her job in the call center, albeit very hoarsely and with severe pain.

Plaintiff asserts that Victor, cited by Defendant, does not support Defendant's position. In Victor, the plaintiff was denied an accommodation for an alleged back injury. Id. at 392. Instead of seeing a doctor, on that particular day, Mr. Victor asked his supervisor, who had no authority, to create a new position for him. Id. at 391-92. The Court held that Mr. Victor did not properly request an accommodation that the employer had an obligation to grant. Id. at 423. Here, Plaintiff alleges that she sought a modification of one of her job duties. She states that she had requested this accommodation over a period of seven months from personnel with authority to do so.

Plaintiff contends that the present matter is at odds with Hennessey, also cited by Defendant, wherein the plaintiff was terminated because the employer refused to accommodate her lifting restriction. Id. at 451. Ms. Hennessey lost her departmental hearing and the trial judge erroneously ruled that the departmental hearing precluded a NJLAD suit in Superior Court. Id. at 455. The Appellate Court reversed and remanded for trial, but the matter settled before being heard. Id. at 456.

Plaintiff agrees that Ensslin is legally relevant, but argues that it is factually different. Plaintiff states that Mr. Ensslin received his day in court, while Defendant in the present matter asks for summary judgment. Plaintiff asserts that Mr. Ensslin's job required physical activity as a police officer, while Plaintiff's position qualified her to perform a number of non-speaking duties.

Plaintiff argues that Raspa is inapposite to the present case. Here, Plaintiff contends that her injuries were caused by Defendant's refusal to give temporary accommodations, while the plaintiff in Raspa was provided temporary light duty until his doctor stated that his condition was permanent. Plaintiff states that Defendant easily accommodated her as soon as the disability became permanent because it was never difficult to do so.

Plaintiff states that she has provided ample evidence that Defendant did not make a good-faith effort to assist her in making accommodations. Plaintiff also alleges that management took affirmative actions to block any accommodations from being afforded to her. She claims that Defendant's management treated her and her requests with contempt. Plaintiff cites Debonis' June 8, 2006 email: "Have you already seen this? So what does she think we can have her do for 3 days? I say we have her stay home." Plaintiff states that Partyka made no reasonable attempts to accommodate her speaking restriction by failing to look outside of the call center to see whether Plaintiff could be accommodated in another area. Plaintiff contends that Partyka denied her request for accommodations within thirty minutes of its submission, which allegedly displays Partyka's lack of effort to seek accommodations. Plaintiff asserts that Westwood similarly failed to take action to accommodate her by merely relying upon Partyka's efforts to seek accommodations.

Plaintiff states that upper management also failed to provide accommodations in good faith. She states that a meeting was scheduled with her union to discuss the issue, but was cancelled at Partyka's request when Plaintiff returned to work in June 2006, following her brief leave of absence. After cancelling the union meeting, Plaintiff states that Ianni failed to respond to Plaintiff's request for reassignment. She points to Ianni's January 5, 2007 email, wherein he admits that Defendant had an obligation to provide accommodations for her, despite their negative personal feelings towards her. Plaintiff also alleges that Smith ignored her complaints of discrimination.

Plaintiff contends that Defendant's requirement of possessing a physician's note before discussing accommodations is in direct violation of the law. In support, Plaintiff cites the following: "It is not necessary that requests for reasonable accommodations be in writing or even use the phrase 'reasonable accommodations.' . . . An employee may use plain English and need not mention the ADA or any other legal source requiring accommodation." Tynan, 351 N.J. Super. at 400. Once such a request is made, "both parties have a duty to assist in the search for appropriate reasonable accommodation and to act in good faith." Id. "To determine what appropriate accommodation is necessary, the employer must initiate an informal interactive process with the employee." Id. Here, Plaintiff argues that no such effort was made. Rather, Plaintiff alleges that greater effort was made to avoid this responsibility.

In reply, Defendant argues that the Court should not rely upon the Civil Service description of Plaintiff's job because it is extremely broad, as it encompasses employees working in many disparate jobs. Defendant states that Plaintiff applied for, and was hired as, a telephone

counselor, for which Defendant has specific job functions which are not shared by other employees who may share the title but are hired into other positions. Defendant points out that Plaintiff admits in the Complaint that her "primary job duty was that of Telephone Counselor, which entailed answering approximately 100 telephone calls per day." Defendant states that Plaintiff was rated in her yearly evaluations by her ability to answer telephone calls, which represented 92% of her job duties.

b. Third Prong – Adverse Employment Action

Second, Defendant contends that Plaintiff cannot satisfy the third prong of a *prima facie* case of discrimination under the NJLAD, which requires a showing of adverse employment action, because Defendant made every reasonable attempt to accommodate Plaintiff's disability. Defendant alleges that it actively made a good faith effort to reasonably accommodate Plaintiff's medical needs as Defendant was made aware of those needs. Defendant states that it provided Plaintiff with multiple leaves of absence after she submitted medical notes, and even reassigned her to work in a different position after working with Plaintiff's doctor.

Defendant notes that it was not obligated to continue Plaintiff's employment due to her permanent inability to perform the essential functions of her position. In support, Defendant cites Jansen v. Food Circus Supermarkets, Inc., 110 N.J. 363 (1988), wherein the court stated that the NJLAD "leave[s] the employer with the right to fire or not to hire employees who are unable to perform the job, whether because they are generally unqualified or because they have a handicap that in fact impedes job performance." Id. at 374.

Defendant further argues that it engaged in the interactive process of determining the appropriate accommodation by engaging in a dialogue with Plaintiff's doctor to determine what job duties she could and could not perform, the amount of talking she could engage in, her long term prognosis and the duration of need for accommodation. Defendant asserts that, pursuant to N.J.A.C. § 13:13-2.5, leaves of absence are an accepted form of accommodation available to all employers. Defendant states that it fulfilled all of its obligations under the law, and even went above and beyond what the law required by: (1) providing two leaves of absence; and (2) permanently reassigning Plaintiff to a different section of the Treasury when Defendant was notified by Plaintiff's doctor that her disability would be for an indefinite duration.

In opposition, as stated above, Plaintiff argues that it is not necessary for her to demonstrate adverse employment action. Plaintiff relies upon the following language from Victor:

> Although the question therefore remains unsettled in the federal court, out LAD's broad remedial purpose and the wide scope of its coverage for disabilities as compared to the ADA support an expansive view of protecting rights of persons with disabilities in the workplace. The LAD's purposes suggest that we chart a course to permit plaintiffs to proceed against employers who have failed to reasonably accommodate their disabilities or who have failed to engage in an interactive process even if they can point to no adverse employment consequence that resulted. Such cases would be unusual, if not rare, for it will ordinarily be true that a disabled employee who has been unsuccessful in securing an accommodation will indeed suffer an adverse employment consequence.

Victor, supra, 203 N.J. at 420-21. Accordingly to this language and the language cited previously, Plaintiff asserts that the Supreme Court has held that adverse employment action is not necessary in every case to establish a *prima facie* violation of the NJLAD.

However, if the Court decides that adverse employment action is necessary, Plaintiff states that she can demonstrate many acts of adverse employment action. Plaintiff alleges the following: (1) she was repeatedly threatened with suspension; (2) she suffered job loss; (3) she lost her pension benefits for 12 weeks; (4) she was given disadvantageous job assignments; (5) she was denied transfers and reassignments; and (6) she withstood a severely hostile working environment.

In reply, Defendant states that Plaintiff was reasonably accommodated with leaves of absence. Defendant argues that talking on the telephone represented 92% of Plaintiff's job duties and that Defendant determined that a leave of absence was appropriate based upon the business needs of Defendant. Defendant contends that employers are not "obligated to provide an employee the accommodation he or she requests or prefers, the employer need only provide some reasonable accommodation." Corder v. Lucent Technologies, 162 F.3d 924, 928 (7th Cir. 1998).

Defendant argues that the leaves of absence granted to Plaintiff were never considered suspensions. Defendant states that Plaintiff was given unpaid leave because, at the time, Plaintiff had no more accrued paid leave available to her. Defendant asserts that there is no evidence that any decision was made to deny Plaintiff pay for her time off to which she was otherwise entitled. Defendant states that Plaintiff had simply used her paid leave.

2. Legitimate, Nondiscriminatory Business Reason & Pretext

The parties disagree as to which test should be applied in this matter: McDonnell Douglas (pretext) or Price Waterhouse (mixed motive). Defendant argues for dismissal solely under the McDonnell Douglas test and does not address the Price Waterhouse test. Plaintiff argues that she is entitled to relief under both tests.

Defendant contends that, assuming *arguendo* that Plaintiff satisfies the *prima facie* case of discrimination for failure to accommodate, Defendant has a legitimate business reason for providing Plaintiff with two leaves of absences in response to the medical documentation she submitted. Defendant contends that there were no light-duty assignments which could have been provided and that transferring Plaintiff into another section would have been overly burdensome and would take way work from other employees.

Specifically, Defendant states that it offered a leave of absence in June 2006 because it determined that there were no light duty assignments which could be provided to Plaintiff during the three-week period requested by her medical documentation. Defendant relies upon the deposition testimony of Partyka and Westwood. Partyka testified at her deposition that, in June 2006, there was no light duty work available in the call center. She also testified that that transferring Plaintiff to another section would have been overly burdensome because it would take too long to train Plaintiff to perform new job duties. Partyka also stated that moving Plaintiff to a position outside of the call center would require taking work away from other employees and/or creating a new position for Plaintiff. Westwood similarly testified that

placing Plaintiff in a new position would have required taking work from other employees and/or would have required the creation of a new position. She stated that she and Partyka considered the options available at the time of Plaintiff's accommodation request and determined that a leave of absence was the appropriate accommodation, given the needs of the Treasury at that time.

Defendant contends that Plaintiff cannot show that Defendant's legitimate business reason for providing two leaves of absence was a pretext for discrimination. Defendant states that Plaintiff has not uncovered any evidence that any Treasury employees involved in the decision to offer her two leaves of absence held any discriminatory bias or any other evidence which could undermine the legitimate business reasons for offering the absences. Defendant asserts that its decision to offer an alternative position to Plaintiff after she was deemed permanently unable to perform the essential functions of her job shows that Defendant was committed to assisting Plaintiff in remaining employed with the Treasury.

In opposition, Plaintiff argues that it is not necessary to analyze pretext because she has demonstrated a *prima facie* case of failure to accommodate, rather than a . Under the NJLAD, Plaintiff contends that, once a plaintiff has established a *prima facie* case, she has established that disparate treatment has occurred and, therefore, it is unnecessary to engage in the burden-shifting paradigms. In support, Plaintiff relies upon a Law Division case, Seiden v. Marina Associates 315 N.J. Super. 451 (Law Div. 1998), wherein Judge Winkelstein, prior to being elevated to the Appellate Division, explained why the burden shifting process is not appropriate in a reasonable accommodations case.

> In a discrimination case based on an employee's handicap, however, when the claim is a failure by the employer to accommodate the handicap, rather than a claim that the handicapped individual was treated differently from nonhandicapped individuals, such an analysis is not necessary. There is no need to indirectly prove discrimination or pretext. When an otherwise qualified handicapped employee is not reasonably accommodated and suffers an adverse employment action because of his or her disability, that, in itself, is sufficient from which to infer discrimination.

Id. at 460-61.

In the event that the Court requires a burden-shifting analysis, Plaintiff argues that the mixed-motive test should apply because there is direct evidence of the discriminatory animus of Plaintiff's supervisors and managers. Plaintiffs contend that the emails produced in discovery, and referenced above, paint a clear picture of a management that was completely callous to Plaintiff's disability, angered by Plaintiff's tenacity in demanding reasonable accommodations, and determined to punish Plaintiff. Plaintiff alleges that these emails are direct statements from decision-makers that demonstrate a discriminatory intent to ignore, deny and retaliate against Plaintiff for requesting accommodations for her disability. Plaintiff states that Defendant has offered no excuse at all for denying reasonable accommodations to Plaintiff in response to all of the requests and complaints she made from June 2006 through January 2007.

In the event that the Court finds that Plaintiff has not provided enough direct evidence to satisfy the mixed-motive test, Plaintiff argues that it can satisfy its burden under the McDonnell