

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

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KAREN Y. MCINTOSH, )  
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 Plaintiff, )  
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 v. ) Civil Action No. 97-10525-RGS  
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 SUNEXPRESS, INC., )  
 PATTY LONG, and )  
 KAY RYAN, )  
 )  
 Defendants. )  

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MEMORANDUM IN SUPPORT OF DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT

Defendants, SunExpress, Inc., Patricia Long, and Kathleen Ryan, submit this memorandum in support of their motion for summary judgment.

Preliminary Statement/Summary of Facts<sup>1</sup>

On August 7, 1995, SunExpress terminated McIntosh for legitimate, non-discriminatory reasons. The termination was lawful. Nevertheless, McIntosh has sued SunExpress, her former supervisor (Long), and SunExpress's human resources manager (Ryan). Her amended complaint contains six counts. Three of the six (I, II, and VI) are claims under anti-discrimination

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<sup>1</sup> Defendants' Local Rule 56.1 Statement of Material Facts of Record, which is submitted separately, contains a detailed statement of the facts supported by citations to transcripts of depositions and other sources.

statutes. McIntosh alleges that SunExpress (1) discriminated against her based on an alleged handicap or disability, (2) refused to consider accommodating her alleged handicap or disability, and (3) retaliated against her for requesting accommodation. She alleges that Long and Ryan aided and abetted the alleged violations. Count III is a claim against Long for intentional infliction of emotional distress. In Count IV, McIntosh alleges breach of an agreement governing her leave of absence. Count V is a claim under the Family and Medical Leave Act ("FMLA").

McIntosh's claims are not supported by the evidence, even viewing it in her favor. In April 1995, Long placed McIntosh on an improvement program after months of unsatisfactory performance. One of the projects on which McIntosh was working at the time – the "overhead presentation" – although very important, was long overdue, having been assigned to McIntosh a year before. On May 4, 1995, McIntosh submitted her seventh draft of the presentation to Long. It was, to put it mildly, not acceptable. After reviewing it, Long said to McIntosh, "This is a piece of crap, and I've waited a year for it."

Six days later, Long gave McIntosh a timetable for improvement that required McIntosh to complete certain projects by specific dates. The overhead presentation was due on May 15.

Mcintosh knew that failure to meet these deadlines could result in termination. On Friday, May 12, McIntosh spoke briefly with Long about the overhead presentation. Long said nothing that McIntosh considered offensive. Later, with the prospect of having to work the weekend to complete the project looming, McIntosh went home. She called the office of her psychologist, William Newman, D. Min., and reported that she was afraid to return to work. She was feeling stress, she now explains, because she felt that she could work all weekend and Long would still find fault with her work and that Long was determined to use her work as a means to terminate her.

Mcintosh did not meet the May 15 deadline. Instead, she went out on paid medical leave. Newman notified SunExpress that McIntosh was suffering from dissociative identity disorder and post traumatic stress disorder, with her condition commencing on May 12, 1995 and "triggered by work stressors." Neither McIntosh nor Newman has been able to identify any specific incident or statement, other than Long's use of the word "crap," as a triggering event.

Mcintosh had surgery in June 1995. Later, her physician, Jacquelyn Starer, M.D., cleared her to return to work with no restrictions on August 7, 1995. Newman cleared her to return to work on August 1, 1995, but with a "recommendation" that she be

transferred to a department where she would feel "validation and support for her work." Newman was not saying that McIntosh could not return to her former position. On the contrary, he believed she could have returned to the same position with the same manager.

Although she understood Newman not to be imposing any restrictions on McIntosh's return, Ryan made some inquiries into the possibility of transferring McIntosh. She found nothing suitable.

McIntosh was scheduled to return to work on August 7, 1995. In the days preceding August 7 and on August 7, McIntosh and Ryan had discussions concerning McIntosh's return to work, and McIntosh sent Ryan several faxes on the subject. McIntosh's position as reflected in her faxes evolved from a request to explore the possibility of a transfer to an artfully-worded request for a "workplace accommodation" on August 7, 1995 (which she sent after she had failed to report to work that morning). She invoked the "workplace accommodation" language "not in any legal sense" and even though, as she admits, she had been cleared to return to work without any restrictions or limitations. Indeed, she has admitted under oath, as has Newman, that she was not substantially limited in performing any major life activity. And, consistent therewith, McIntosh never told anyone at

SunExpress before August 9th that she had any physical or mental impairment that substantially limited or, indeed, limited to any degree her ability to perform the essential functions of her position.

As noted, McIntosh failed to report for work on August 7. Upon learning this, and being advised that McIntosh no longer wanted to work for her, Long decided to terminate her. Long explained that McIntosh "had been released from the medical leave in full capacity to return to work . . . . We fully expected her to show up . . . . She didn't come into work." Long's assessment was that McIntosh "was a performance problem, and this was typical of her behavior not to show up when I needed her to show up. So I made the decision based on her performance to terminate her employment." Notably, when asked why she did not show up on August 7, McIntosh does not say that it was because she was disabled or handicapped or because she had been denied a "workplace accommodation." She gives, instead, a number of reasons, including that she did not know where to go, that she did not think that she had been expected to return to work on that day, that she did not know what was expected of her because of Ryan's silence, and that she did not know whether her former position was still there.

In view of this evidence, McIntosh's discrimination claims fail because, as she admits, she was not "disabled" or "handicapped." They also fail because she did not communicate any alleged disability or handicap to Defendants. Her claim for failure to accommodate fails also because she made no request for a reasonable accommodation. And finally, her discrimination claims fail because there is no proof of pretext or of discriminatory animus.

McIntosh's claim for intentional infliction of emotional distress fails both because the single incident on which it is based – Long's statement that McIntosh's seventh draft of the overhead presentation was "crap" – was not extreme and outrageous conduct and because the claim is barred by the exclusivity provisions of the workers compensation act.

McIntosh's claim for breach of contract fails because there was no breach by SunExpress. Indeed, it was McIntosh who breached.

Finally, McIntosh's claims under the FMLA fails because McIntosh received all of the leave to which she would have been entitled under the FMLA and because her position was available to her on August 7. Further, there is no proof of discriminatory animus.

#### Argument

I. MCINTOSH'S DISCRIMINATION CLAIMS  
ARE FATALLY FLAWED

Mcintosh asserts claims under both the Americans with Disabilities Act, 42 U.S.C. §§ 12101, et seq. (the "ADA"), and its Massachusetts counterpart, Chapter 151B. Because the analyses under the ADA and Chapter 151B are in most respects identical, see, e.g., Dichner v. Liberty Travel, 1998 U.S. App. LEXIS 7362 at \*13 161137 (1st Cir. April 13, 1998), and Grindley v. Royal Indemnity Co., 1996 U.S. Dist. LEXIS 21933 at \*19 (D. Mass. 1996), the claims are discussed together.<sup>2</sup>

A. Mcintosh's Initial Burden

Mcintosh's claims for discriminatory discharge/refusal to accommodate<sup>3</sup> under the ADA require her to prove, among other things, that (1) she was disabled within the meaning of the ADA, and (2) that, with or without reasonable accommodation, she was able to perform the essential functions of her job (i.e., that she was "qualified"). See, e.g., Jacques v. Clean-Up Group, Inc., 96 F.3d 506, 511 (1st Cir. 1996). Under Chapter 151B, she must prove, among other things, that (1) she was handicapped within the meaning of the statute, and (2) she was qualified to

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<sup>2</sup> Copies of these decisions are included in an addendum to this memorandum.

<sup>3</sup> As discussed below, the burden is different with respect to McIntosh's retaliation claims.

perform the essential functions of the job with or without reasonable accommodation. See, e.g., Dartt v. Browning-Ferris Indus., Inc., 427 Mass. 1, 2 (1998). The analysis of whether one is disabled for purposes of the ADA is the same as the analysis of whether one is handicapped for purposes of Chapter 151B. See, e.g., Grindley, 1996 U.S. Dist. LEXIS 21933 at \*19 and cases cited therein.

B. Mcintosh Was Not "Disabled" Or "Handicapped" Within The Meaning Of The ADA Or Chapter 151B

Under the ADA, the term "disability" means:

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such impairment.

42 U.S.C. § 12102(2). The definition of "handicap" under Chapter 151B is identical. Mass. Gen. L. ch. 151B, § 1(17).

1. 42 U.S.C. § 12102(2)(A)/Ch. 151B, § 1(17)(a). In Soileau v. Guilford of Maine, Inc., 105 F.3d 12, 15 (1st Cir. 1997), the First Circuit explained that a prima facie case of discrimination based on the definition contained in the first subparagraph of § 12102(2) requires proof of three elements: (1) a physical or mental impairment that (2) "substantially limits"

(3) a "major life activity."<sup>4</sup> When she was terminated, McIntosh had no impairment that (1) substantially limited (2) a major life activity. She has admitted these crucial facts,<sup>5</sup> and her

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<sup>4</sup> Regulations promulgated by the Equal Employment Opportunity Commission contain the following definitions:

Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

- (1) The term substantially limits means:
  - (i) Unable to perform a major life activity that the average person in the general population can perform; or
  - (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.
- (2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:
  - (i) The nature and severity of the impairment;
  - (ii) The duration or expected duration of the impairment; and
  - (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. § 1630.2 (1997) (emphasis added). The definition of "major life activities" under Chapter 151B tracks the language of 29 C.F.R. § 1630.2(i).

- <sup>5</sup> McIntosh testified as follows:
- Q. Now, is it your position, Miss McIntosh, that on August 7th, 1995 that you had a physical impairment or condition that substantially limited your ability to perform one or more major life activities?  
MS. SWEENEY: Objection.
- A. I don't really understand the question. What do you mean by "life activities"?
- BY MR. NAGLE:
- Q. Well, by life activities, Miss McIntosh, I mean functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.
- A. I didn't have any impairment that would just — I could do those things.
- Q. On August 7th, 1995?
- A. Yes.

therapist confirmed them. McIntosh was neither disabled nor handicapped under 42 U.S.C. § 12102(2)(A) or Ch. 151B, § 1(17)(a).

It is expected that McIntosh nevertheless will claim an impairment that affected her ability to work. This claim will fail. Under the ADA and Massachusetts law, such a claim requires proof that the plaintiff was "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having

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- Q. And as a matter of fact, from August 7th on, could you do all those things without any substantial impairment or limitation due to any physical or mental condition that you had?  
MS. SWEENEY: Objection.
- A. I don't really know what you mean by substantial limitation. I know that I was — let me finish. I know that from August until the end of September of 1996 I was in a rehabilitative program, that was not — on August 7th I was able to do those things, and on August 9th I was able to do those things.  
BY MR. NAGLE:
- Q. Okay. So on August 7th and August 9th of 1995, you did not have any physical or mental impairment that substantially limited your ability to perform any of your major life activities as I asked you?
- A. I had and do have a physical impairment, but it does not prevent me from performing those activities.
- Q. Okay. What is the physical condition?
- A. I still have fibroids and I still have my mental condition.
- Q. Pardon me?
- A. I still, you know, I still have — I'm still the same pretty much mentally, I still have the mental condition.
- Q. Whatever your mental condition is now or whatever it was in August of 1995, you do not claim, do you, Miss McIntosh, that the mental condition constituted any kind of impairment or disability that substantially limited your ability to engage or perform one or more of your major life activities, are you?  
MS. SWEENEY: As you've described them?  
MR. NAGLE: Yes.
- A. No. I was ready to return to work and use all those capabilities.

Dep. of McIntosh, pp. 3-648-50.

comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(I); Grindley, 1996 U.S. Dist. LEXIS 21933 at \*19 (analyses same under ADA and Chapter 151B). The uncontroverted evidence is that McIntosh did not have such an impairment. Indeed, she does not even claim that she was limited in her ability to perform even her own job. McIntosh simply did not want to work for Long, did not want her work criticized, was not meeting the requirements of a performance improvement plan (and thus faced possible termination), and simply did not like her job. This is not an impairment. "'The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.'" Grindley, 1996 U.S. Dist. LEXIS 21933 at \*19 (quoting 29 C.F.R. § 1630(i) and (j)(3)(i)).

The work-related "impairment" that McIntosh appears to be poised to claim is directly and solely related to her interaction with Long. But no court has recognized an inability to get along with a manager as an impairment that can support a claim under the ADA or Chapter 151B. On the contrary, the First Circuit's decision in Soileau indicates that an inability to get along with a manager is not such an impairment. 105 F.3d at 15. Accordingly, any claim by McIntosh based on her relationship with Long falls under Soileau and cases like it. See, e.g., Palmer v.

Circuit Court, Social Service Dep't., 905 F. Supp. 499, 508 (N.D. Ill. 1995) (plaintiff's inability to get along with supervisor and co-worker did not establish that she was "disabled" under the ADA) aff'd, 117 F.3d 351 (7th Cir. 1997), cert. denied, 118 S.Ct. 893 (1998); Clark v. Virginia Bd. of Bar Examiners, 861 F. Supp. 512, 517 (E.D. Va. 1994) (rejecting plaintiff's claim that an impairment of her ability to "concentrate, act decisively, sleep properly, orient [herself], and maintain ordinary social relationships" constituted a major life activity under the ADA); Kotlowski v. Eastman Kodak Co., 922 F. Supp. 790, 797 (W.D.N.Y. 1996) (plaintiff not disabled under the ADA because she failed to demonstrate that her depression "substantially limited her ability to work at not only her then existing job, but any job").<sup>6</sup>

2. 42 U.S.C. § 12102(2)(B), (C)/Ch. 151B, § 1(17)(b), (c).

For many of the reasons discussed above, McIntosh also cannot demonstrate a "record of" an impairment that substantially limits

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<sup>6</sup> If McIntosh claims that she suffers from a broader impairment that makes her particularly sensitive to stress and/or criticism, the claim would sow the seeds of its own demise. If she had such sensitivity, she would not be able to perform the essential functions of her position and as such would not be an otherwise qualified individual. The type of position that McIntosh held in the competitive computer industry has inherent pressures and stress from which no employee can reasonably be insulated. See, e.g., Larkins v. CIBA Vision Corp., 858 F. Supp. 1572 (N.D. Ga. 1994) (plaintiff who was unable to perform essential functions of job due to post-traumatic stress disorder, dissociative episodes, panic disorder and major depression was not qualified individual under ADA); EEOC v. Amego, 110 F.3d 135 (1<sup>st</sup> Cir. 1997) (employee's depression rendered her unqualified to perform essential job function and suggested accommodation unreasonable).

a major life activity or that she was "regarded as having such an impairment." 42 U.S.C. § 12102(2)(B), (C); Mass. Gen. L. ch. 151B, § 1(17)(b), (c). The mere assertion of a diagnosis of some disorder is, of course, insufficient: To prevail under the alternative definitions requires proof of a "record of," or proof of "being regarded as" having, an impairment that substantially limits a major life activity. McIntosh has acknowledged that she had no such impairment, and the only limitation of any sort that Newman could identify was an inability to have a "heterosexual" relationship, which is not an impairment under either the statutes or the regulations. There was, therefore, no "record." Likewise, McIntosh did not tell anyone at SunExpress before August 9, 1995, that she had any condition that substantially affected her ability to perform any type of activity, much less those identified as major life activities. Moreover, given the fact that her physician and her therapist cleared her to return to work, with no restrictions, McIntosh would stretch the limits of good faith pleading if she were to claim that she had a record of being impaired or that she was regarded as being impaired at the time she was terminated. The uncontradicted evidence is that both Ryan and Long expected and assumed, on the basis of information provided on behalf of McIntosh, that she would return to work on August 7, 1995, without any restrictions or

limitations of any type. McIntosh herself acknowledged that she was prepared to return without any restrictions other than the request for "validation," the meaningless term addressed fully below. Clearly, nobody at SunExpress "regarded" McIntosh as being substantially limited in one or more of her major life activities on August 7, 1995.

In summary, McIntosh was neither disabled nor handicapped, under any definition. Therefore, her claims under federal and state law for discrimination on the basis of a disability or handicap are without merit.

B. McIntosh Was Not Entitled To, And Failed  
To Communicate, A Request For Accommodation

1. Failure To Communicate Alleged Disability. McIntosh's claim that SunExpress failed to consider an alleged request for reasonable accommodation has additional flaws. To prevail on this theory under the ADA, an employee must be a "qualified individual with a disability" and must demonstrate that she had a substantial physical or mental limitation requiring an accommodation and that the employer knew of such limitation. See, e.g., Perry v. New England Bus. Serv., Inc., 1997 U.S. App. LEXIS 13054 at \*2 (1st Cir. June 3, 1997) (unpublished opinion) (affirming this Court's grant of summary judgment where employer unaware that accommodation necessary for plaintiff's physical

limitations).<sup>7</sup> The impairment must be a significant one to trigger the Act's obligation to provide a reasonable accommodation, and "[a]bsent a disability . . . no obligations [to make reasonable accommodations] are triggered for the employer." Soileau, 105 F.3d at 15 (acute, episodic depression not sufficiently significant to trigger an obligation of the employer to provide accommodation). The Massachusetts courts likewise recognize that only a "handicap" that substantially limits a major life activity may trigger the statutory obligations. See, e.g., Grindley, 1996 U.S. Dist. LEXIS 21933 at \*19.

For example, in Taylor v. Principal Financial Group, Inc., 93 F.3d 155, 166 (5th Cir.) cert. denied, 117 S.Ct. 586 (1996), the court affirmed the entry of summary judgment against an employee suffering from bipolar disorder and anxiety disorder. Although the plaintiff had told his employer of his disorder, he never told his employer about any limitation. The court

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<sup>7</sup> Defendants are unaware of any case law under Chapter 151B that discusses the last-noted element of a plaintiff's case. Nevertheless, because Chapter 151B and the ADA contain virtually identical language concerning accommodations, and because logic dictates that an employer cannot be held liable for failing to accommodate where it has not been asked to do so, it is safe to assume that the Massachusetts courts would follow the principles articulated by the federal courts. As to the other elements, Massachusetts law clearly is the same: "The term 'qualified handicapped person' means a handicapped person who is capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of a particular job with reasonable accommodation to his handicap." Mass. Gen. L. ch. 151B, § 1(16) (emphasis added).

recognized that while a disability may limit one employee, it may not necessarily limit another individual. "For this reason, the ADA does not require an employer to assume that an employee with a disability suffers from a limitation. In fact, better public policy dictates the opposite presumption: that disabled employees are not limited in their abilities to adequately perform their jobs." Id. at 164.

Thus, an ADA plaintiff must disclose not only the disability but also any limitation affecting his ability to perform his duties. In Taylor, the plaintiff had asked for only "a reduction in his 'objectives,' and a lessening of the 'pressure.'" Id. at 165. The court ruled that such a request was "too indefinite and ambiguous to constitute a formal request for accommodation under the ADA." Id. Significantly, the Taylor court noted that: "Where the disability, resulting limitations, and necessary reasonable accommodations, are not open, obvious, and apparent to the employer, as is often the case when mental disabilities are involved, the initial burden rests primarily upon the employee, or his health-care provider, to specifically identify the disability and resulting limitations, and to suggest reasonable accommodations." Id. (emphasis added). See also Fussell v. Georgia Ports Auth., 906 F. Supp. 1561, 1569 (S.D. Ga. 1995) ("the ADA plaintiff must also show that the employer had

knowledge of the limitation and the need to accommodate it before it failed to make a reasonable accommodation") (emphasis added), aff'd, 106 F.3d 417 (11th Cir. 1997).

The only information that SunExpress received concerning McIntosh's condition came from her doctors, both of whom cleared her for work with no restrictions or limitations. McIntosh certainly did not inform SunExpress of any disability, corresponding limitations, and suggested accommodations. (How could she have? After all, she admits that she was not limited in her ability to perform her job.<sup>8</sup>) Newman's suggestion that McIntosh receive "validation" is in no sense equivalent to notice of a disability, corresponding limitations, and suggested accommodations. Moreover, when SunExpress obtained clarification from Newman prior to McIntosh's return, he indicated that it was not that she could not do the job and that he was merely recommending that she have a change in manager.

2. A Request For Validation Is Not A Request For Reasonable Accommodation. Newman cleared McIntosh to return to

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<sup>8</sup> Indeed, McIntosh does not even claim that she was incapable of performing the essential functions of her job without reasonable accommodation. Without more, her claim for failure to accommodate fails because, as this Court has recognized, "[t]he issue of reasonable accommodation 'is only considered when a handicapped person is not able to perform the essential functions of the job.'" Petsch-Schmid v. Boston Edison Co., 914 F. Supp. 697, 703, (D. Mass. 1996), aff'd, 108 F.3d 328 (1st Cir. 1997), quoting Tate v. Department of Mental Health, 419 Mass. 356, 362, 645 N.E.2d 1159, 1163 (1995).

work with no restrictions, merely recommending that McIntosh be transferred to an environment where she could have "validation." In subsequent faxes to Ryan, McIntosh converted Newman's recommendation first into "possible options regarding recommended work modifications" (July 31, 1995), then into "transfer . . . recommended as a work modification" (August 6, 1995), and then into "workplace accommodation requested" (August 7, 1995). These self-serving, conclusory statements do not suffice as requests for accommodation. The lack of essential information in these communiqués is, of course, consistent with McIntosh's testimony that she had no limitations. The insertion of the phrase "workplace accommodation" in her August 7 fax thus suggests a not-so-subtle design to "paper" her employment status with some legally significant connotation. Be that as it may, McIntosh testified that she did not use the language with any legal implications and that she was not imposing any restrictions on her return.

Several analogous case are instructive. In Borkowski v. Valley Cent. School Dist., 63 F.3d 131 , 139 (2d Cir. 1995), the Second Circuit, in applying the concept of reasonable accommodation under the Rehabilitation Act, held that a plaintiff must show that an effective accommodation exists that would render her qualified. "[T]he plaintiff bears the burden of

proving that she can meet the requirements of the job without assistance, or that an accommodation exists that permits her to perform the job's essential functions." Id. at 138. The latter requirement, namely, "if an accommodation is needed," requires a plaintiff to prove "that an effective accommodation exists that would render her otherwise qualified." Id. at 139. Moreover, the accommodation must be "reasonable." As the Borkowski court noted, "'[r]easonable' is a relational term: it evaluates the desirability of a particular accommodation according to the consequences that the accommodation will produce." Id. at 138.

Measured by these standards, a request for a position providing "validation" is unreasonable as a matter of law. It is unrelated to the performance of the essentials of the position. And, if it had been made, it would have rendered McIntosh unaccountable: McIntosh would have been free to claim that the slightest criticism was a failure to validate forming the basis of a claim of failure to accommodate.

Also instructive is Barth v. Gelb, 2 F.3d 1180 (D.C. Cir. 1993), cert. denied, 114 S. Ct. 1538 (1994). The Barth court explained that the reasonableness of an accommodation involves two criteria: its effectiveness in enabling the employee to perform, and the reasonableness of the burdens it imposes on the employer. Id. at 1186, 1187. "Validation" meets neither

criterion. An employer is not required to create a new position and to ensure that the position meets to the employee's satisfaction a claimed need for "validation."

The gravamen of McIntosh's claim appears to be that she was seeking relief from the work-related stress she claims to have been experiencing, specifically as a result of her relationship with Long. But the law does not provide a right to a stress-free job. For example, in Mazzarella v. United States Postal Serv., 849 F. Supp. 89 (D. Mass. 1994), the court entered summary judgment against a plaintiff who had been diagnosed with "an explosive personality disorder." The plaintiff claimed that his supervisor had maliciously harassed him and created a stressful environment. The court rejected his claim that a reasonable accommodation should include his employer "displaying greater sensitivity and awareness toward him." Id. at 95. The court noted that it is not reasonable to expect an employer "to juggle personnel so as to entirely remove the possibility that a supervisor may offend a particular employee" and that "occasional stressful conditions such as these are inevitable in any workplace." Id. In language that applies here, the court wrote, "It is simply not reasonable to require the [employer] to ensure that [the plaintiff] never face any stressful conditions at work." Id. at 96.

C. Mcintosh Cannot Show Pretext  
Or Discriminatory Animus

Even if McIntosh could demonstrate the other elements of her claims for discrimination and failure to accommodate, the claims would fail because she cannot prove pretext or discriminatory animus. See, e.g., Amego, 110 F.3d at 145. In Champagne v. Servistar Corp., 1998 U.S. App. LEXIS 4444 (1st Cir. Mar. 1998), the First Circuit explained (again) the analysis of these issues. The plaintiff in Champagne had filed discriminatory termination and retaliation claims under the ADA based on his alleged emotional disorders. The district court granted summary judgment for the employer, concluding that the plaintiff's condition did not meet the statutory definition of a disability and that the evidence of retaliation was insufficient. The First Circuit affirmed, taking a "shorter route." Id. at \*13. It concluded that the termination claim failed on the issue of causation because the plaintiff had not produced "evidence from which a finder of fact could reasonably find that [his employer] 'discharged [him] in whole or in part because of [his] disability . . .'" Id. at \*13-14. In reaching this conclusion, the court of appeals applied the familiar McDonnell Douglas burden-shifting framework. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Under this framework, after a plaintiff has made out

a prima facie case, the burden shifts to the employer to articulate a legitimate and nondiscriminatory reason for its employment action. If the employer does so, the burden shifts back to the employee to demonstrate that the proffered reason for the action is a pretext for discrimination. The plaintiff must do more than impugn the veracity of the employer's reason; he must provide facts based on which a jury could conclude that the reason is a sham intended to cover up the employer's real motive. Champagne, 1998 U.S. App. LEXIS 4444 at \*16.

Here, as in Champagne, there are no facts from which an inference of pretext or discriminatory animus may reasonably be drawn. McIntosh's failure to prove a prima facie case aside, Defendants have articulated (and substantiated through admissible evidence) legitimate and nondiscriminatory reasons for their actions. As noted, McIntosh was cleared to return to work for Long on August 7, 1995. She did not show up, so Ryan called her at home and discussed her failure to report. Ryan indicated during the call that McIntosh would have to continue reporting to Long. Although McIntosh denies having done so, Ryan testified that McIntosh told Ryan that she did not want to work for Long. (She admits, however, that in a prior discussion with Ryan she at least implied that she did not want to work for Long.) Be that as it may, after the call, McIntosh sent Ryan her third fax, which

Ryan read and understood to mean that McIntosh did not want to work for Long. (This is, indeed, the only fair reading of the fax under the circumstances.) Ryan then told Long of McIntosh's failure to report and continued resistance to working for Long. Long knew that McIntosh had been cleared to return to work on August 7, 1995 without restriction, had expected McIntosh to return and, most important, needed her to return. Long, who had had months of exposure to McIntosh's poor attitude and performance, reacted thus: "She [McIntosh] was a performance problem, and this was typical of her behavior to not show up when I needed her to show up. So I made the decision based on her performance to terminate her employment." Long's reasons were legitimate and non-discriminatory. McIntosh can neither impugn them nor provide facts based on which a jury could reasonably conclude that the reasons are a pretext for discrimination.<sup>9</sup>

D. McIntosh's Retaliation  
Claims Also Are Flawed

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<sup>9</sup> While McIntosh's ADA claim requires proof of pretext plus specific facts that would enable a jury to conclude that the reason is a pretext for discrimination, her burden under Chapter 151B is slightly lighter. Specifically, she could avoid summary judgment on her Chapter 151B by proving only pretext. See, e.g., Dichner v. Liberty Travel, 1998 U.S. App. LEXIS 7362 at \*14. The distinction is immaterial here for McIntosh cannot show even pretext.

As noted, McIntosh alleges independent claims for retaliation under the ADA and Chapter 151B.<sup>10</sup> Where, as here, there is no direct evidence of retaliatory animus, a retaliation claim under state or federal law requires a plaintiff to "establish a prima facie case and prove that the defendants' legitimate business reasons for terminating the plaintiff were pretextual." McMillan v. Massachusetts SPCA, 1998 U.S. App. LEXIS 5983 at \*52 (1st Cir. March 18, 1998). The prima facie case requires proof that (1) the plaintiff was engaged in protected conduct under state or federal law, (2) the plaintiff suffered an adverse employment action, and (3) a causal connection between the two. See, e.g., Soileau, 105 F.3d at 16. The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse action. The plaintiff then must show that the defendant's reason is pretextual and that the decision was the product of

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<sup>10</sup> McIntosh's scatter-shot attempt to invoke the protections of the anti-discrimination statutes brings to mind this admonition of the Soileau court: "A danger of the line of argument presented by Soileau is that it would permit an employee already on notice of performance problems to seek shelter in a belated claim of disability. The ADA was not meant to prevent employers from taking steps to address poor performance by non-disabled employees. As Judge Sporkin has said in rejecting an ADA retaliation claim, 'To allow the anti-discrimination laws to be used by poorly performing employees will eventually work to the detriment of those who have a legitimate need for the protection of the laws.'" Soileau, 105 F.3d at 17 n.4 (citation to quoted case omitted).

discriminatory animus. McMillan, 1998 U.S. App. LEXIS 5983 at \*52.

1. Mcintosh Was Not Engaged In A Protected Activity. As shown above, McIntosh was not a qualified disabled or handicapped person, she did not claim to SunExpress that she was disabled or handicapped, her doctors had cleared her to return to work without restriction, and she did not effectively request accommodation, reasonable or otherwise. SunExpress did not consider her to be handicapped or disabled or consider her to be requesting accommodation. Under these circumstances, McIntosh was not engaging in a protected practice when she was terminated. See, e.g., Champagne, 1998 U.S. App. LEXIS 4444 at \*21 (doubtful that plaintiff had shown that he had engaged in a protected practice where he had not asserted that he was disabled and had not provided the employer with any medical evidence from which a conclusion of a disability was warranted).<sup>11</sup>

2. Defendants Have Articulated Non-Pretextual Legitimate And Non-Discriminatory Reasons. As demonstrated above, McIntosh was terminated not because of any alleged disability or because of any claim of a disability or because of any alleged request

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<sup>11</sup> There is language in Soileau that suggests otherwise, but the issue has not been squarely addressed. An individual who clearly is not disabled or handicapped should not be permitted to claim retaliation based on a simple invocation of the phrase "workplace accommodation."

for accommodation. She was terminated for legitimate, non-retaliatory reasons, and there is no evidence of pretext. Thus, even if she could establish a prima facie case of retaliation, her retaliation claims fail at the second stage of the burden shifting analysis.

3. There Is No Evidence Of Retaliatory Animus. Even if McIntosh's retaliation claims could survive the first two stages of the burden-shifting analysis, they would fail at the third. As shown above, there is no evidence of any retaliatory animus.

## II. MCINTOSH'S CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS IS FATALLY FLAWED

### A. The Elements

A claim for intentional infliction of emotional distress requires proof of extreme and outrageous conduct. See, e.g., Tetrault v. Mahoney, Hawkes & Goldings, 425 Mass. 456, 681 N.E.2d 1189, 1997 (1997). McIntosh has no such proof.

B. Mcintosh's Claim

In her amended complaint, McIntosh alleged that Long "intentionally and maliciously sought to inflict severe emotional distress upon McIntosh and committed acts amounting to extreme and outrageous conduct." (Amended Complaint, ¶ 27.) In discovery, however, McIntosh was able to point to a single incident, viz. Long's comment, after reviewing McIntosh's dismal work on the overhead presentation project, that "this is a piece of crap, and I've waited a year for it." This incident is not, as a matter of law, "extreme and outrageous conduct."

C. Exclusivity Bar

Even if McIntosh had proof of extreme and outrageous conduct, her claim would still fail. It is settled that an employee's claim for intentional infliction of emotional distress is barred by the exclusivity provisions of the Massachusetts workers compensation act, Mass. Gen. L. ch. 152, § 24. See, e.g., Green v. Wyman-Gordon Co., 422 Mass. 551, 559, 664 N.E.2d 808, 813 (1996); Doe v. Purity Supreme, Inc., 422 Mass. 563, 566, 664 N.E.2d 815, 818 (1996).

Mcintosh's allegations designed to avoid the bar that "Long acted outside the scope of her employment" are not supported by any evidence. In Chatman v. Gentle Dental Ctr., of Waltham, 973 F. Supp. 228 (D. Mass. 1997), the court dismissed the plaintiff's

claim for intentional infliction of emotional distress based on the exclusivity provision of the Massachusetts Workers' Compensation Act. The claim against a fellow employee was also dismissed on that basis because it was clear from the complaint that the individuals were acting within the scope of their employment. So here. No amount of imaginative rhetoric by McIntosh can transform Long's statement into activities unrelated to SunExpress' interests.

III. MCINTOSH'S BREACH OF CONTRACT  
CLAIM IS FATALY FLAWED

McIntosh alleges that she and SunExpress signed a medical leave of absence agreement (the "MLOA") under which she was granted medical leave and job security if she returned to SunExpress within twelve weeks of commencement of the leave. (First Amended Complaint ¶ 10.) She alleges, in turn, that SunExpress breached the MLOA by "not providing McIntosh with her job or substantially equivalent jobs once her leave ended." (First Amended Complaint, ¶ 31.)

Paragraph three of the MLOA provides:

3. Job Protection: Providing that employee had been employed at Sun for 12 months and worked 1,250 hours during the previous 12 months, upon return from my medical leave, Sun will return me to the same or substantially equivalent job, subject to the following: . . . Medical Disability (Non-Occupational): Up to 12 weeks job protection with physician's certification.

Mcintosh's claim, however, ignores another provision of the MLOA.

Paragraph eighteen provides:

I agree to return to work on the first scheduled work day after the leave expires unless an extension has been approved, in writing, by the company before hand. Failure to comply with this requirement will be considered a voluntary termination.

Thus, SunExpress did not breach the MLOA, McIntosh did, excusing SunExpress's performance. A breach of contract occurs when a party to the contract fails to perform a duty that is due under its terms. See, e.g., Sterilite Corp. v. Continental Casualty Co., 20 Mass. App. Ct. 215, 220, 479 N.E. 205, 208 (1985), rev'd on other grounds, 397 Mass. 837 (1986). McIntosh's duty was to return to work on August 7, 1995. Her position was open and available to her on that day. She did not report to work, nor was a written extension approved. Her breach extinguished any duty SunExpress might otherwise have had.

Under paragraph 18 of the MLOA, SunExpress had the right to consider McIntosh's failure to return to work as a voluntary termination of employment, excusing it from any obligations. Paragraph 18 is clear and unambiguous, and "[i]t is . . . elementary that an unambiguous agreement must be enforced according to its terms." White Contracting v. MBTA, 40 Mass. App. Ct. 937, 938, 666 N.E.2d 518, 519 (1996), quoting Schwanbeck v. Federal-Mogul Corp., 412 Mass. 703, 706, 592 N.E.2d 1289, 1292

(1992). Enforcing the MLOA according to its terms is fatal to McIntosh's breach of contract claim. See, e.g., Coll v. PB Diagnostics Systems, Inc., 50 F. 3d 1115, 1122 (1st Cir. 1995) (interpretation of an employment contract is a question of law for the court under Massachusetts law and the contract language should be given its plain meaning).

IV. MCINTOSH'S FMLA CLAIM IS  
FATALLY FLAWED

McIntosh's FMLA claim boils down to an allegation that SunExpress violated McIntosh's rights under the FMLA "by failing to restore McIntosh to the same or equivalent position on her return from her leave of absence, by interfering with her exercise of her rights under the FMLA and by discharging McIntosh for asserting her rights under the FMLA." (First Amended Complaint, ¶ 34.) This claim, like her others, will not lie.

A. The Statute

The FMLA provides in relevant part that:

an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

. . . .

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

29 U.S.C. § 2612(a)(1).

B. Mcintosh Received Adequate Leave

Assuming arguendo that SunExpress was an "employer" and that McIntosh was an "eligible employee" who had "a serious health condition" under the FMLA, she still cannot prevail. McIntosh went out on medical leave effective May 15, 1995. Even assuming McIntosh's leave was pursuant to the FMLA, it began on May 15, 1995. The maximum time period provided under the FMLA had expired by the day she was scheduled to return, August 7, 1995. She therefore has no claim and had no FMLA rights to assert. See, e.g., Santos v. Shields Health Corp., 1998 WL 97804 (D. Mass. March 6, 1998) (copy attached hereto).

C. There Is No Proof Of Animus

Mcintosh cannot prove that the decision to terminate her was based on discriminatory animus. At the beginning of her scheduled workday on Monday morning, August 7, 1995, McIntosh's position was available to her and both Long and Ryan expected her presence that morning. Viewing the facts in a light most favorable to McIntosh, and based on the foregoing assumptions in terms of her status under the FMLA, McIntosh had no rights greater than any other employee at SunExpress that morning. McIntosh's statements that she did not know where to go or what position she had, as disingenuous as they are, are insufficient as a matter of law to resurrect her FMLA status that morning.

Similarly, her subsequent telephone conversation with Ryan that morning cannot cloak her with FMLA status. The undisputed and pivotal facts are that her position was available for her on the morning of August 7, 1995, and she did not go to work. McIntosh should not be entitled to use FMLA status following the expiration of her leave to obtain additional rights and benefits from her employer and to alter the status of the employment relationship at that point when she, like other employees, was subject to the directions and expectations of her manager.

The McDonnell Douglas framework is applied to FMLA claims. See, e.g., Oswalt v. Sara Lee Corp., 889 F. Supp. 253, 259 (N.D. Miss. 1995), aff'd, 74 F.3d 91 (5th Cir. 1996); Kaylor v. Fannin Regional Hosp., Inc., 946 F. Supp. 988, 1002-03 (N.D. Ga. 1996).

In Kaylor, the court explained:

Once the plaintiff has established a prima facie case . . . the employer/defendant must come forward with a legitimate nondiscriminatory reason to justify the employment decision . . . . [[T]he employer's production of a legitimate nondiscriminatory reason] defeats the presumption of intentional discrimination created by the prima facie case [and] the plaintiff bears the burden of producing evidence to show that the articulated legitimate nondiscriminatory reason is merely a pretext for discrimination.

Id. at 1001, citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981). See also Sidaris v. Runyon, 967 F.

Supp. 1260 (M.D. Ala. 1997); Leary v. Hobet Mining, Inc., 981 F. Supp. 452 (S.D.W. Va. 1997).

Mcintosh has no evidence of animus, nor even that she requested FMLA leave. The decision to terminate her employment was animated by legitimate reasons related to her job performance.

Conclusion

For the foregoing reasons, defendants' motion for summary judgment should be granted.

Dated: April 20, 1998

SUNEXPRESS, INC., PATTY LONG,  
and KAY RYAN,

By their attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April 1998, a true and correct copy of the foregoing document was served by hand at the office of counsel of record for plaintiff.

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Joseph M. Kaigler

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