IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARGARET CATALANOTTI	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 03-CV-02187
	:	
v.	:	Before the Hon. James Knoll Gardner
	:	United States District Judge
THOMAS JEFFERSON UNIVERSITY HOSPITAL	:	
	:	
	:	**FILED ELECTRONICALLY**
Defendant.	:	

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

In this employment dispute the legally blind was hired and then fired by the illegally blind. Plaintiff, Margaret "Jill" Catalanotti, is legally blind. She developed Retinitis Pigmentosa ("RP") nearly 25 years ago. RP has rendered her unable to see at night at all, and it has stripped her of her peripheral vision. RP makes it extraordinarily difficult to see words in front of her, thereby impairing her ability to read. Yet, she has persevered and overcome this disability, serving as an inspiration to her family, friends and fellow students at the University of Pennsylvania where she graduated with a Master's degree in Social Work in May 2001.

Shortly after graduation, she was hired into Defendant's social work department. However, her supervisor looked the other way as Plaintiff struggled with the lighting and computer screen, and then fired Plaintiff for poor performance after a mere six weeks on the job. This supervisor - who

never bothered to look at the pre-employment forms showing that Plaintiff has a visual disability and who had never even bothered to acquaint herself with the obligations of the Americans with Disabilities Act of 1990 ("ADA") - ignored Plaintiff's conspicuous need for a modest accommodation. Instead, the supervisor was willfully blind to it. After Plaintiff's firing, she sought assistance with the U.S. Equal Employment Opportunity Commission ("EEOC") which concluded that Defendant ("Jefferson") violated Plaintiff's civil rights.

Now, at this final stage, Plaintiff respectfully urges the Court to allow her to present her version to a jury, because if her version is believed she will prevail. She seeks back pay (counsel is in the process of stipulating to the amount at issue), meaningful compensatory damages for the emotional harm Jefferson caused her, and a punitive damages award in order to ensure that Jefferson will comprehend that its obligations under the ADA are not optional and that Congress no longer permits the kind of statutory blindness it practices.

II. PROCEDURAL HISTORY

Plaintiff's complaint, filed on April 8, 2003, asserts violations of the ADA (42 U.S.C. § 12101 *et seq*.), and of the Pennsylvania Human Relations Act ("PHRA") (43 P.S. § 951 *et seq*.). These two claims comprise counts one and three of her complaint respectively.[1] In February of this year, the matter was reassigned to His Honor. *See Case Doc. No. 11*. Three months later the undersigned

[1] Count two of the complaint asserts a violation of 42 U.S.C. § 1981a. However, the language of 42 U.S.C. § 1981a indicates that the statute provides additional remedies for plaintiffs who can otherwise show violations of Title VII of the Civil Rights Act of 1964, or the ADA, but it does not create a new cause of action. *Cf. Pollard v. Wawa Food Mkt*., 366 F. Supp. 2d 247, 251-52 (E.D. Pa.) (E.D. Pa. 2005) (citing cases). Accordingly, should this matter proceed to trial, Plaintiff may seek the remedies enumerated in Section 1981a(a)(2).

entered his appearance, and after the Court established a firm period for additional discovery, Defendant has moved for summary judgment. The discovery period allowed counsel to whittle down the dispute to one area of vigorous and profound disagreement - whether Defendant violated the ADA and PHRA by failing to engage in an interactive process with Plaintiff to accommodate her visual disability.[2] Indeed, counsel has so stipulated to this singular issue. *See Stipulation on Liability Issues* (attached in Pl.'s Summ. J. Exs. as Ex. 1).

III. STANDARD OF REVIEW

Summary judgment should only be granted if "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c).* In a motion for summary judgment, the moving party bears the burden of proving that no genuine issue of material fact is in dispute, *see Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585 n.10, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986), and all evidence must be viewed in the light most favorable to the nonmoving party, *see id.* at 587. Once the moving party has carried its initial burden, then the nonmoving party "must come forward with 'specific facts showing there is a genuine issue for trial'", *Matsushita*, 475 U.S. at 587 (quoting *Fed. R. Civ. P. 56(e)*) (emphasis omitted); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986) (holding that the nonmoving party must go beyond the pleadings to show that there is a genuine issue for trial).

[2] The Third Circuit Court of Appeals has held that the ADA and the PHRA are to be interpreted co-extensively. *See, e.g., Kelly v. Drexel Univ.*, 94 F.3d 102, 105 (3d Cir. 1996). A violation of one constitutes a violation of the other.

IV. UNDISPUTED FACTUAL BACKGROUND

Plaintiff was first diagnosed with RP in 1982. *Pl.'s Dep*. at 5 (Plaintiff's complete deposition transcript is attached in Pl.'s Summ. J. Exs. as Ex. 2). RP, a degenerative disease of the retina, has left her blind at night and has stolen her peripheral vision. *Id*. at 6.[3] The disease affects both her eyes, and she has been declared legally blind. *Id*. at 5; *EEOC Charge* at 1 (attached as Ex. 3). She has never taken medication for the disease or been advised to do so. *Pl.'s Dep*. at 5-6. As her night vision deteriorated, she stopped driving at night in 1988 or 1989 after she could not find her way home. *Id*. at 32-33. She stopped driving altogether in 1995.[4] *Id*. at 31. She cannot see at all in the dark. *Id*. at 43. As far as her peripheral vision loss, she cannot see anything above her, below her, or off to either side. She can only see people or things if they are directly in front of her. *See generally id*. at 6-9; *see also Pl.'s Aff*. at 1 (attached as Ex. 4). In trying to see written materials, she is significantly hamstrung. She can only see a few letters at a time, and so to read she strings the letter groups together. *Pl.'s Aff*. at 2. Plaintiff was approved for social security disability income back in 1997 or 1998. *Pl.'s Dep*. at 52.

Losing her ability to drive compelled Plaintiff to switch professions, as she had been a realtor.

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[3] According to the National Institutes of Health, individuals with RP develop night blindness and a gradual loss of peripheral vision. This is precisely what happened to Plaintiff. See http://www.nei.nih.gov/news/pressreleases/rppressrelease.asp (last checked December 12, 2006).

[4] Defendant characterizes Plaintiff as having "voluntarily stopped" driving. *See Def.'s Statement of Facts* at 2, ¶ 7. Plaintiff's decision to give up the freedom that driving provides was as "voluntary" an act as was Lee's surrender to Grant at Appomattox. Plaintiff made this decision so as not to put anyone's life in danger. *Pl.'s Dep*. at 31-32.

Pl.'s Dep. at 76. In her early-50s, she went back to school to become trained to do another job. *Id*. She enrolled at the University of Pennsylvania, earning her Bachelor's degree in 1999.[5] *See Pl.'s Resume* (attached as Ex. 5). She continued on and enrolled in Penn's School of Social Work where she graduated in May 2001 with her Master's degree. *Id*.; *Pl.'s Dep*. at 88. She applied to Defendant's social work department in August 2001. *Id*. at 91-92. The position which she applied for, and was hired for, was that of a "medical social worker." *Id*. at 99. The basic responsibility of the position was discharge planning. *Id*. If a patient was going to a rehabilitation facility or nursing home upon discharge from the hospital, it was Plaintiff's responsibility to ascertain their needs, find a facility, arrange transportation, etc. *Id*. at 100. The reason Plaintiff was interested in the position is because she had done the same thing as an intern at the University of Pennsylvania hospital while in graduate school. *Id*.; *Pl.'s Aff*. at 1-2. Plaintiff explained that she had done well during that internship and this success was confirmed by her supervisor at Jefferson (Eileen Winter) before they hired her. *Id*.; *see also Dep. of Eileen Winter* at 61-62 (Winter's complete transcript is attached as Ex. 6).

Plaintiff had two sets of interviews before being hired. The first one was with Joan Tannebaum (director of the social work department) and another supervisor. *Pl.'s Dep*. at 103. Approximately one week later Plaintiff was called back to meet with Eileen Winter (a social work department supervisor who reported to Tannebaum), along with two other supervisory-level employees. *Id*. at 105-06. Tannebaum offered Plaintiff the position by telephone in the second week of September 2001. *Id*. at 107-09. Plaintiff accepted within 24 hours by telephone. *Id*. at 110. Her

[5] At graduation Plaintiff was presented with the Linda Bowen Santoro Award for her "unusual motivation and dedication in pursuit of an undergraduate degree." *See* Ex. 5; *see also* Christine Bahls, *Disease Pushes Woman to Live Life Help Others*, Bucks County Courier Times, May 1999 (attached in Ex. 5).

start date was September 24, 2001. *Ex. 3 (Pl.'s EEOC Charge)* at 2. Winter was her direct supervisor. *Id.* She was fired by Winter on Monday, November 5, 2001 - exactly six weeks later. *Id.* at 3-5.

V. PLAINTIFF DISCLOSED HER DISABILITY UPON HER HIRE

Fairly said, Plaintiff did not advertise her visual disability during her short tenure at Jefferson. However, she did disclose it where appropriate. During the first interview with Tannebaum, there was no discussion about her vision. *Pl.'s Dep.* at 104. At the second interview, this time with Winter and two other supervisors, there also no discussion about her vision. *Id.* at 107. During the two in-person interviews, Plaintiff did not use any vision-assisting devices that would have made it known to the interviewers that she had a visual disability. *Id.* at 112. Indeed, at no time prior to accepting the job in the second week of September 2001 did she inform Defendant that she had a disability or needed an accommodation to do the job. *Id.* at 111-12. The reason for the silence is simple - Plaintiff had done the same job at the University of Pennsylvania hospital without an accommodation and had no reason to believe she would need one at Jefferson. *Pl.'s Aff.* at 1-2 (attached hereto as Ex. 4).

On Tuesday, September 18, 2001 - approximately one week after she accepted Defendant's job offer - Plaintiff completed a series of pre-employment forms and underwent Defendant's physical examination. *See generally Pl.'s Dep.* at 111-22. On the Employment Application form, Plaintiff certified she could do all the functions of her job without an accommodation. *See Employment Application dated September 18, 2001* (attached as Ex. 7); *Pl.'s Dep.* at 115. Again, she had no reason to think otherwise based on the Penn experience. Plaintiff also completed an "EEO Data Request Form" (attached as Ex. 8). On this form Plaintiff responded "No" to the question of "Do

You ***Wish*** to Declare Yourself Handicapped or Disabled?" *Id*. (emphasis supplied); *Pl.'s Dep*. at 116-17.

On other forms that Plaintiff completed prior to her September 24, 2001 start date, Plaintiff did disclose her disability. **On the Personal Data Form, when it asked specifically, point-blank whether she had a disability, Plaintiff checked "Sight."** *See Personal Data Form* (attached as Ex. 9). Another relevant document Plaintiff completed prior to starting was the "Pre-Placement Physical Evaluation" form. **Here, she checked "Visual Difficulty."** *See* Ex. 10.[6] Defendant, therefore, was alerted to her visual disability by virtue of their pre-employment procedures.

VI. PLAINTIFF IS LEGALLY BLIND: SHE COMES WITHIN THE GROUP OF INDIVIDUALS PROTECTED BY THE ADA

Before addressing Defendant's contentions that it did not violate the ADA by failing to engage in an interactive process with Plaintiff in order to accommodate her disability, Plaintiff will first respond to Defendant's contention that Plaintiff is not even "disabled" as defined by the ADA. *See Def.'s Br*. at 10-13. The ADA provides that no covered employer "shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, . . . and other terms, conditions and privileges of employment." 42 U.S.C. § 12112(a). The ADA defines "disability" as

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[6] During her deposition Plaintiff revealed that during her pre-employment physical no one asked her to explain the nature of her "Visual Difficulty" as disclosed on the Pre-Placement Physical Evaluation form, or why she had checked "Sight Disability" on the Personal Data Form. *Pl.'s Dep*. at 121. As will be discussed *infra*, not only did her supervisor Eileen Winter never see these two forms before, *but when asked Winter had no idea why employees would even complete the forms*. *Winter Dep*. at 106-08 (transcript attached as Ex. 6). Winter has been a Jefferson employee since 1984. *Id*. at 15. As will also be discussed *infra*, despite supervising 10-20 employees, the full extent of her knowledge as to an employer's obligations under the ADA derived from several questions to human resources by telephone spread over an eight year-period. *Id*. at 12, 48-51. There were never any training sessions, and the ADA term "interactive process" was foreign to her. *Id*. at 51.

a "physical or mental impairment that substantially limits one or more of the major life activities of [the] individual." 42 U.S.C. § 12102(2)(A).

The Third Circuit has endorsed the EEOC's regulations in interpreting the ADA's provisions. *See, e.g., Emory v. AstraZeneca Pharms. LP*, 401 F.3d 174,180 n.4 (3d Cir. 2005). The EEOC's interpretive guidelines define the term "substantially limits" to 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.
>
> 29 C.F.R. § 1630.2(j)(1); *see also Emory*, 401 F.3d at 180.

The EEOC guidelines further counsel that the following factors should be considered in determining whether an individual is substantially limited:

> (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(j)(2); *see also Emory*, 401 F.3d at 180.

The major life activity implicated in this case, obviously, is the activity of seeing. The EEOC's regulations include "seeing" as a major life activity. 29 C.F.R. § 1630.2(i). While Defendant, in arguing that Plaintiff is not "disabled" (*see Def.'s Br.* at 10-13), highlights the ways in which Plaintiff has overcome her blindness, *this is not the proper focus of the inquiry*. Rather, "the paramount inquiry" is whether Plaintiff has an impairment that prevents or severely restricts her vision. *Emory*,

401 F.3d at 181 (*quoting Toyota Motor Mfg., Ky. v. Williams*, 534 U.S. 184, 197, 122 S. Ct. 681, 151 L. Ed. 2d 615 (2002)). In performing this inquiry, a court compares the way in which she is able to see with the way in which an average member of the general population can see. *Emory*, 401 F.3d at 181. If Catalanotti is substantially limited in "seeing," then she has established that she is disabled under the ADA. *Id*. Therefore, and contrary to Defendant's assertions, "*what a plaintiff confronts, not overcomes, is the measure of substantial limitation under the ADA*." *Id*.

Retinitis Pigmentosa is a rare, inherited disease in which the retina of the eye slowly and progressively degenerates, eventually causing blindness. *See* DORLAND'S ILLUSTRATED MED. DICTIONARY 1566 (29th ed. 2000). RP affects both of Plaintiff's eyes. *Pl.'s Dep*. at 5. She is legally blind.[7] *EEOC Charge* at 1 (attached hereto as Ex. 3). She cannot see at all in the dark, which is why she uses a cane to walk at night. *Id*. at 43. Her peripheral vision is virtually non-existent. She can only see directly in front of her, and only then if the light is good. *See Pl.'s Aff*. (attached as Ex. 4). RP has also impaired her ability to see words, i.e., her ability to read. As she described it to Defendant's counsel, "You look at a word and you see the whole word. I look at a word, and I see one letter." *Pl.'s Dep*. at 222; *see also Pl.'s Aff*.

Only lawyers would actually dispute whether someone who is legally blind, and who cannot see at all in the dark, has no peripheral vision, and who has profound difficulty seeing written words

[7] Blindness is defined by law: in most states of the United States, maximal visual acuity of the better eye, after correction, of 20/200 or less, with a total diameter of the visual field in that eye of 20 degrees or less. *Dorland's Illustrated Medical Dictionary, 29th Ed*., (W. B. Saunders Co. 2000) p. 220. It is undisputed that Plaintiff's doctors have diagnosed her to be legally blind as defined under Pennsylvania law. *See* 55 Pa. Code § 451.3(c) ("A person is blind if his visual acuity with best correcting lens is 3/60 or 10/200 or poorer in the better eye . . . .").

in front of her is "substantially limited" in the activity of seeing.[8] Defendant's reliance on Judge Kauffman's decision in *Congleton v. Weil McLain*, 2003 U.S. Dist. LEXIS 15573, 2003 WL 22100877 (E.D. Pa. 2003) is unavailing. In *Congleton*, the employee lacked depth perception, had a limited field of vision, had no peripheral vision on his left side and could not see objects on his left side clearly. However, unlike Catalanotti, the plaintiff in *Congleton* had vision in one eye of 20/25 or better. Further, there was no evidence he was declared legally blind, or had any impairment in seeing written words, or had any difficulty whatsoever seeing in the dark. *Id*. *Congleton* is simply inapposite.

Instantly, because Plaintiff has demonstrated her ability to prove at trial that her eye condition significantly restricts the acuity and manner in which she can see compared to the condition and manner in which the average person in the general population can see, Plaintiff has shown that she can prove she is "disabled" within the meaning of the ADA. *Cf. Cutchen v. Sunoco, Inc.*, 2002 U.S. Dist. LEXIS 15426, at *29, 2002 WL 1896586 (E.D. Pa. 2002).

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[8] To be fair to members of our profession, plenty have not made this argument. *See, e.g., EEOC v. Hesco Parts Corp.*, 57 Fed. Appx. 518, 519 (3d Cir. 2003) (unpublished opinion) (parties stipulated that individual with Retinitis Pigmentosa was disabled under the ADA); *Johnson v. Equicom, Inc.*, 2001 U.S. Dist. LEXIS 18032, at *10 (N.D. Tex 2001) (same); *Bull v. Coyner*, 2000 U.S. Dist. LEXIS 1905, at *24, 2000 WL 224807(N.D. Ill. 2000) (Defendant employer did not challenge on summary judgment that Plaintiff employee with RP was disabled under the ADA); *Salmon v. West Clark Community Sch.*, 64 F. Supp. 2d 850, 859 (S.D. Ind. 1999) (same). Defendant's unwillingness to make this concession of an obvious fact is disappointing but not surprising. Earlier in this case, they asserted Plaintiff has no right to jury trial on her PHRA claim despite the fact that every Pennsylvania federal court decision in the last six years held to the contrary. *See Opinion of the Court* dated October 17, 2006. Aside from doing the parties and the Court no service, its "position" on this fact unwittingly provides further undergirding for W.C. Field's famous quip, "The only thing a lawyer won't question is the legitimacy of his mother."

VII. AN EMPLOYER'S DUTY TO ENGAGE IN AN "INTERACTIVE PROCESS"

The real issue of this case is whether Defendant failed to meet the statutory requirements of the ADA by failing to engage in "an interactive process" to determine the "reasonable accommodations" Plaintiff needed to do her job. This is the issue upon which Plaintiff seeks a trial. The ADA itself does not specifically refer to an interactive process, and "requires only that an employer make a reasonable accommodation to the known physical or mental disability of a qualified individual with a disability unless the employer can show that the accommodation would impose an undue hardship on the employer." *Conneen v. MBNA America Bank, N.A.*, 334 F.3d 318, 329 (3d Cir. 2003) (citing 42 U.S.C. § 12112(b)(5)(A)). Nevertheless, 29 C.F.R. § 1630.2(o)(3) states as follows:

> **To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.**
>
> 29 C.F.R. pt. § 1630, app. 1630.9 at 359.

The Third Circuit has opined on several occasions as to the contours and objectives of the interactive process. For example, in *Mengine v. Runyon*, 114 F.3d 415 (3d Cir. 1997), the court stated "both parties have a duty to assist in the search for an appropriate reasonable accommodation and to act in good faith." 114 F.3d at 420. n13. Six years later, in *Conneen*, the court cited its own precedents in counseling:

> **[t]he purpose of the interactive process is to determine the appropriate accommodations: this process should identify the precise limitations resulting from the disability and the potential reasonable**

> **accommodations that could overcome those limitations. When the interactive process works well, it furthers the purposes of the . . . ADA. It may, in fact, not only lead to identifying a specific accommodation that will allow a disabled employee to continue to function as a dignified and valued employee, it may also help sensitize the employer to the needs and worth of the disabled person. It therefore furthers the interest of the employer, and the dignity and humanity of the disabled employee.**
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> *Conneen*, 334 F.3d at 330 (internal citations and quotations omitted).

Plaintiff seeks a judgment entered against Defendant for failing to engage in this interactive process and ascertain collectively what reasonable accommodations could be made to help her see better at work. But, in order for her to hold Jefferson liable for a breakdown in the interactive process, she must show that: (1) the employer knew about her disability; (2) she requested accommodations or assistance for her disability; (3) the employer did not make a good faith effort to assist him in seeking accommodations; and (4) she could have been reasonably accommodated but for her employer's lack of good faith. *Conneen*, 334 F.3d at 330-31. Plaintiff will now review the record evidence in relation to this four-part "*Conneen* test."

VIII. PLAINTIFF'S EVIDENCE SATISFIES THE *CONNEEN* TEST

There can be no question that Defendant was aware of her disability such that the first part of the *Conneen* test was met. Plaintiff disclosed it on her pre-employment paperwork. *See Section V. supra*.[9] Additionally, as will be shown momentarily when reviewing the second element of the test,

[9] Strangely, Defendant did not share with the Court - in either its brief or statement of facts - that Plaintiff completed two pre-employment forms notifying Defendant of her visual disability. *See Personal Data Form* (attached hereto as Ex. 9); *Pre-Placement Physical Evaluation* (attached hereto as Ex. 10).

she made it known clearly to Winter that she had a visual problem and needed assistance. Winter simply ignored her.

A. Defendant Had Enough Information to Inquire About the Possible Need for Accommodation

Regarding *Conneen's* second element, the law does not require any formal mechanism or "magic words," to notify an employer that an employee needs an accommodation. *Conneen*, 334 F.3d at 332 (*citing Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 313 (3d Cir. 1999)). The requirement is that by direct communication or other appropriate means, the employee must make clear that the employee wants assistance for his or her disability. *Id.* (*citing Jones v. United Parcel Serv.*, 214 F.3d 402, 408 (3d Cir. 2000)). The employer must have enough information to know of both the disability and desire for an accommodation or circumstances must at least be sufficient to cause a reasonable employer to make appropriate inquiries about the possible need for an accommodation. *Id.* (*citing Taylor*, 184 F.3d at 313) (internal quotations omitted) (emphasis supplied). Instantly, circumstances were such that a reasonable employer should have made appropriate inquiries. The record evidence explicating these circumstances is as follows:

> ! Plaintiff's supervisor, Eileen Winter, was on vacation during Plaintiff's second week of employment. *Winter Dep.* at 68. During Plaintiff's third week (October 12-16, 2001), Plaintiff shared with Winter the difficulty she was having seeing the computer screen which prevented her from using the software package comfortably. *Pl.'s Dep.* at 150-51. Unlike the system she used while at Penn's hospital, Jefferson's software program used shades of gray making it very difficult for Plaintiff to read the material on the screen. *Id.* at 151. During their weekly meeting, Plaintiff told Winter that she "was having difficulty reading the screen, and I'm spending too much time on it." *Id.* at 151-53. Winter responded, "I don't know what can be done, the computer is 'what it is.'"[10] *Ex. 3 (Pl.'s EEOC Charge)* at 2.

[10] At her deposition on August 14, 2006, Plaintiff testified that she could not recall Winter responding to this

! At that same meeting, Winter was showing Plaintiff how to use the email system. *Id*. at 171-73; *Ex*. *3* at 2. Winter was standing behind her pointing to the screen after Plaintiff told her she was having difficulty seeing things. In pointing to something on the screen that Winter wanted her to focus on, Winter stated, "I don't know about this vision thing." *Id*. at 171-73; *Ex*. *3* at 2.[11]

! At that time (midway through her employment) or shortly thereafter, Plaintiff shared with Winter that she had difficulty filling out Patient Information Forms.[12] *Ex*. *3* at 2. Plaintiff explained that the difficulty was attributable to the fact that she was having trouble reading the patient charts and gleaning the necessary information. Winter "responded the charts are not going to change." *Id*.

! On the Thursday or Friday before her termination, Plaintiff met with Winter on a patient floor in the hospital for a supervisory session. *Pl*.*'s Dep*. at 140-41, 144-45; *Ex*. *3* at 2-3. They reviewed a patient's chart. *Pl*.*'s Dep*. at 144. Plaintiff told her that she was having difficulty completing the Patient Information Forms because she was having trouble reading the patients' charts. *Ex*. *3* at 2. Winter asked her, "Is it you can't read it? What's going on here? " Plaintiff responded, "The lighting is why I can't read it." Winter said, "Well, that is a problem, there aren't many places to go in the hospital with good lighting." *Pl's Dep*. at 144; *Ex*. *3* at 2-3.

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remark. However, in her sworn affidavit dated January 17, 2002, she stated Winter responded "I don't know what can be done the computer 'is what it is'." *See* Ex. 3 at p. 2. Drawing all facts and reasonable inferences in Plaintiff's favor, the Court should accept the affidavit version because Plaintiff's deposition testimony did not specifically contradict it, just that she could not remember it testifying five years later. This is not a situation wherein a party has submitted an affidavit contradicting an earlier deposition thereby justifying a disregard of the affidavit. *See Martin v*. *Merrell Down Pharm*., 851 F.2d 703 (3d Cir. 1988).

[11] In her 2002 affidavit Plaintiff stated definitively that these two exchanges occurred during the same meeting. *See* Ex. 3 at p. 2. In her 2006 deposition, Plaintiff first was not sure, but then agreed they could have occurred at the same meeting. *Pl*.*'s Dep*. at 172-73. This mild uncertainty five years after the fact, without the benefit of her more contemporaneous affidavit to refresh her recollection, is understandable.

[12] It is undisputed that completing the Patient Information Forms ("PIF's") was one of Plaintiff's important job responsibilities. The purpose of the PIF was to assist another area of the social work department find longer-term placement for patients when they no longer needed to remain in the hospital. *Pl*.*'s Dep*. at 135-37; *EEOC Charge* at 2 (See Ex. 3). Among other things, a PIF provided financial information, contact information, an explanation of the patient's medical issues, why the patient was leaving the hospital and the prescribed medications. *Id*. Some of the information needed on a PIF had to be derived from the patients' charts (*Id*. at 135) and Plaintiff was having considerable problems reading them due to the lighting. *Pl's Dep*. at 135, 144; *Ex*. *3* at 2-3.

! On Monday, November 5, 2001, during the meeting at the conclusion of which Winter fired her, Plaintiff told Winter she was having difficulty reading the patient charts. *Pl.'s Dep*. at 179. Winter responded again,"the charts are not going to change." *Id*.; *Ex. 3* at 4.

Aside from these five incidents that should have compelled Winter to inquire as to whether Plaintiff needed an accommodation, Plaintiff also indicated directly to Winter that she had a problem with her vision. During the third week of her employment (Winter was on vacation during the second week), Plaintiff said to her "if she saw me in the hospital and I didn't respond to her, it wasn't because I was being rude, but it was just that I didn't see her." Winter did not respond. *Pl.'s Dep*. at 176-77; *Ex. 3* at 2. On another occasion, near the end of daylight savings time, Plaintiff informed Winter that she would be using a cane when standard time returned. At her deposition, Plaintiff detailed the incident:

Q: Describe for me the conversation about the cane that was with Eileen.

A: I told her as daylight savings time was ending and we were going back to standard time that it would be dark when I left the hospital and I would be using a cane.

Q: Did you tell her you'd be using a cane to go home?

A: To get to the train station.

Q: Did you ever tell Eileen that you needed to use your cane in the hospital?

A: No.

Q: What did Eileen say after you told her that you needed to use the cane to get to the train after daylight savings time ended?

A: Thank you for sharing that.

Q: Did she say anything else?

A: No.

Pl.'s Dep. at 177.

If Plaintiff's version of these incidents is believed, a jury could very well conclude that the circumstances "sufficient to cause a reasonable employer to make appropriate inquiries about the possible need for an accommodation." *Conneen*, 334 F.3d at 332. Thus, Plaintiff has met her burden on the second element of the *Conneen* test at this stage.

B. It is Undisputed Defendant Made No Effort to Assist

To satisfy third element of the *Conneen* test, Plaintiff must produce competent record evidence that the employer did not make a good faith effort to assist her in seeking accommodations. Here, it is undisputed that Defendant did zero in response to the information at its disposal. Plaintiff submitted forms expressly indicating she had a disability. *See Personal Data Form* (attached hereto as Ex. 9) (Plaintiff checked "Sight Disability"); *Pre-Placement Physical Evaluation* (attached hereto as Ex. 10) (Plaintiff checked "Visual Difficulty"). During the six week period under Winter's stewardship, Plaintiff indicated to Winter on several occasions that she was having problems seeing what she needed to see to do her job, yet Winter remained willfully blind to it. *See Section VIII(A) supra*.

It is not terribly surprising that Winter turned the other way, rather than extend the ADA's statutory hand of accommodation. While Winter's supervisor, Joan Tannebaum, described her as an "outstanding employee" (*Tannebaum Dep*. at 30) (transcript attached as Ex. 11), she acknowledged Winter was more "rigid" and "strict" on small things that would "tend to annoy employees greatly."

Id. at 31-32. Tannebaum admitted that on these things Winter could have made "an employee feel better about working" and that she could have been more "sensitive to the needs of employees or the wishes of employees." *Id*. at 33.[13]

It is also not surprising that Winter did not make the "appropriate inquiries" as *Conneen* requires since *she was never trained on the ADA*. The little that she knew about it was derived from several questions to human resources by telephone spread over an eight year-period. *Id*. at 12, 48-51. Despite supervising 10-20 employees, Jefferson provided her with no training at all as to an employer's obligations under the ADA. *Id*. at 12, 48-51. The ADA term "interactive process" was foreign to her. *Id*. at 51. This is particularly startling since Winter enrolled in no fewer than 85 professional development classes with Jefferson during the time period of 1996-2002.[14] However, not one of these classes touched on the ADA.

Winter had no idea as to the purpose of the revealing pre-employment forms - the forms which disclosed Plaintiff's disability. *Winter Dep*. at 106-10 (referencing the *Personal Data Form* (attached hereto as Ex. 9) (Plaintiff checked "Sight Disability") and the *Pre-Placement Physical Evaluation* (attached hereto as Ex. 10) (Plaintiff checked "Visual Difficulty"). Winter said she knew of no reason to ask to review the documents. *Id*. at 106. Her deposition was the first time she had

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[13] It would also not be terribly surprising if a jury believed Plaintiff's version of Winter's terse responses to her complaints about the lighting and the computer screen. Tannebaum admitted that Winter had problems communicating with her subordinates, and that she had received complaints about Winter's communication style. *Tannebaum Dep*. at 34-35.

[14] This computation is based on six documents from Winter's personnel file. They are stamped D-947, 962, 969, 1003, 1021, 1048. Jefferson's counsel has asserted that Winter's personnel file documents are confidential and are not to be filed with the Court except under seal. Plaintiff finds that overbearing since Winter's training and background at Jefferson are core issues in this case. Nevertheless, unless the Court requests these documents or Jefferson challenges the accuracy of Plaintiff's assertion, Plaintiff will not attach them.

ever seen the Personal Data Form. *Id*. at 107. Winter was equally as ignorant as to the purposes and contents of the Pre-Placement Physical Evaluation. *Id*. at 108.[15]

Jefferson congratulates itself on having a written EEO policy and purportedly requiring its personnel to make a reasonable accommodation of an individual's disability. *Def.'s Statement* at 4, ¶ 12. Defendant's policy is a hollow one as this case demonstrates. They provide no training and take no measures to see to it that those who must effectuate the policy, i.e., supervisors like Winter, know how to do so. With just a modicum of sensitivity and knowledge, Winter could have avoided the unlawful error that she committed. She essentially admitted as such at her deposition, as the following exchange demonstrates:

> Q: Would it have made a difference to you had you seen [*Personal Data Form* (attached hereto as Ex. 9)], which has checked "sight disability", would that have made any difference to you in retrospect?
>
> A: If I had saw a disability, I would have asked human resources if there was anything to be concerned about.
>
> Q: Fair to say if you had seen this document before hand, you would have at least made a call to HR?
>
> A: Yes.
>
> *Winter Dep*. at 111.[16]

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[15] Joan Tannebaum, Winter's boss, and director of Defendant's social work department was equally as clueless as to the nature, purpose and importance of these pre-employment forms. Tannebaum supervised as many as 43-45 full-time employees. *See Tannebaum Dep*. at 9-10, 60 (Q: Have you ever in the past asked for access to those documents? A: No. Why would I?. No.), 61 (Q: It never occurred to you as to why you might want to look at those documents? A: No.), 62.

[16] Defendant is well aware of the risk Winter's deficiencies pose. That is why, remarkably, they now claim in their Statement of Material Facts that it wasn't Winter, but Tannebaum who fired Plaintiff. This belated squirming contradicts their own submission to the EEOC where they stated, unequivocally, **"On November 5, 2001, Ms. Winter**

Indeed, the EEOC concurred with Plaintiff's assertions, concluding "[d]espite having knowledge that the [Plaintiff] was vision impaired and that this impairment was adversely impacting her ability to read various forms and charts required in the performance of her job, there is no evidence to indicate that the [Defendant] made any attempt to enter into an interactive process with the [Plaintiff] about the possible need for a reasonable accommodation prior to terminating her employment." *See EEOC Determination Letter* dated December 4, 2002 (attached as Ex. 14).[17]

C. Plaintiff Could Have Been Accommodated, the Only Question Was How

As the final element of the *Conneen* test, Plaintiff must be able to show at trial that she could have been reasonably accommodated but for her employer's lack of good faith. *Conneen*, 334 F.3d at 330-31. Defendant, in a footnote, contends that Plaintiff cannot meet this final requirement because at her deposition she could not identify a specific accommodation that would have allowed her to successfully perform her job. *Def.'s Br.* at 10 n. 7 (presumably citing to pp. 200-202 of Plaintiff's deposition). This cavalierly presented assertion is both misleading and lacking in merit.

First, Plaintiff did testify at her deposition that better lighting was one specific accommodation that would have been necessary. *Pl.'s Dep.* at 201. This would allowed her to have read the patients' charts more easily. Plaintiff also testified that the specifics would have been left to the Office of Vocational Rehabilitation ("OVR") (*Id.* at 183), and that earlier on the day she was fired she told her

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terminated Ms. Catalanotti's employment . . . .". *See Jefferson's Statement of Position* at 4 (attached hereto as Ex. 12). Winter's own notes from that day state, "Had to let Jill go." *See Winter Note dated November 5, 2001* (at very bottom) (attached hereto as Ex. 13). The most Tannebaum would explicitly admit was that she approved Winter's recommendation to fire her. *Tannebaum Dep.* at 56. The only firsthand observation Tannebaum made of Plaintiff's deficiencies is that Plaintiff appeared "aloof" at a party. *Id.* at 53.

[16] This EEOC determination letter may be admissible at trial. *Coleman v. Home Depot, Inc.*, 306 F.3d 1333 (3d Cir. 2002).

office mate that she was going to bring this up with Winter. *See EEOC Charge* at 3 (attached as Ex. 3). Second, it does not necessarily follow that just because she couldn't specify what exactly needed to be done (aside from lighting), that she could not have been reasonably accommodated. She was able to do the same job successfully at Penn when there was better lighting and computer screen that better contrasted the text from the background colors. *Pl.'s Aff*. 2-3. Defendant's counsel did not ask her about these differences during Plaintiff's deposition. Further, Plaintiff has provided firsthand testimony of several measures that OVR employees to help those who are visually disabled read documents in hard copy and text on a computer. *Id*. Based on this record, a jury could find that Plaintiff could have been reasonably accommodated. Truly it defies common sense to assert that the two accommodations could not be reasonably provided and Defendant offered no evidence that they could not have been.

IX. CONCLUSION

For the reasons elucidated herein, Plaintiff respectfully argues that she has earned a jury trial and that Defendant's motion for summary judgment should be denied accordingly. Her evidence could lead a rational fact-finder to conclude that she has satisfied the four-part *Conneen* test. A proposed order follows.

Respectfully submitted,

THE WEINSTEIN LAW FIRM

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Counsel to Plaintiff

Dated: December 18, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARGARET CATALANOTTI	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 03-CV-02187
	:	
v.	:	
	:	
THOMAS JEFFERSON UNIVERSITY HOSPITAL	:	
	:	
	:	
Defendant.	:	

ORDER

NOW, this _____ day of _____, 2007, upon consideration of Defendant's motion for summary judgment filed on December 1, 2006, and upon consideration of the briefs of the parties,

IT IS ORDERED that the motion is denied.

BY THE COURT:

_____
James Knoll Gardner
United States District Judge

CERTIFICATE OF SERVICE

I, Marc E. Weinstein, Esquire, hereby certify that on the 18th day of December, 2006, I caused the foregoing **Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment** to be filed via ECF and that Raymond A. Kresge, Esquire is a filing user under the ECF system. Upon the electronic filing of a pleading or other document, the ECF system will automatically generate and send a Notice of Electronic Filing to all filing users associated with this case. Electronic service by the Court of the Notice of Electronic Filing constitutes service of the filed document and no additional service upon the filing user is required.

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