UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ORANGEBURG DIVISION

James L. Wilson,	)	Civil Action No.: 5:03-4164-RBH
	)	
	)	
Plaintiff,	)	
vs.	)	
	)	**O R D E R**
Phoenix Specialty Mfg. Co., Inc.	)	
	)	
Defendant.	)	
	)	

This action was initiated on December 29, 2003 by the plaintiff, Jimmy Wilson, alleging causes of action for discrimination in violation of the Employee Retirement Income Security Act, 29 U.S.C. §1140; Americans with Disabilities Act, 42 U.S.C. §12101; Age Discrimination in Employment Act of 1967, 29 U.S.C. §621;[1] and pendent state law claims for breach of contract accompanied by fraudulent act and breach of the covenant of good faith and fair dealing. The plaintiff filed an Amended Complaint on March 17, 2004, alleging, in addition to the above causes of action, breach of contract based on an employee handbook.

This Court issued an Order on March 28, 2006 denying the defendant's motion for summary judgment. The cause of action alleging breach of a covenant of good faith and fair dealing was dismissed by agreement of the plaintiff. Inasmuch as neither party requested a jury trial, this matter came before the Court for a bench trial on April 18 and 19, 2006.

After reviewing the exhibits presented by the parties and hearing the testimony of the witnesses,

[1] The Court finds that the plaintiff has satisfied all of the prerequisites to filing his federal statutory claims.

this Court has duly considered the relevancy and weight of the evidence and has assessed the credibility of the witnesses. Based on all of the evidence, this Court finds that the plaintiff has met his burden of proof with regard to the ADA claim, but has not met his burden of proof on his remaining claims. The Court makes the following findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

I. Findings of Fact

1. Plaintiff Jimmy Wilson was born on June 16, 1946. He became employed with the defendant, Phoenix Specialty, a closely held family business, as its shipping supervisor in November of 1988. Wilson was a dependable employee who often worked six to seven days per week.

2. Phoenix manufactures specialty washers used principally in the aviation industry and, according to its EEOC position statement, employs 94 individuals. The President and Chief Operating Officer of Phoenix is Robert Hurst. Hurst is responsible for all hiring and firing decisions of the Defendant. Hurst is also responsible for human resources, in addition to his other functions, and negotiates employee benefits annually based on bids received through his insurance broker, Brandon Guest. Phoenix had a self-funded health plan and purchased stop-loss insurance to cover health insurance claims of over $25,000 per year for each employee. Harry Wise, a Vice President, is responsible for shipping and inventory and was Wilson's immediate supervisor. Ray Squires is Vice-President in charge of production and is the plant manager.

3. Wilson was terminated on August 1, 2002, effective on August 2, 2002. At the time of his termination from Phoenix, the plaintiff was fifty-six years of age.

4. Wilson was diagnosed with Parkinson's disease in 1998. According to Dr. Bergmann, the neurologist Wilson began consulting on May 24, 2001, Parkinson's Disease is a progressive

degenerative disease of the nervous system that involves both motor and non-motor dysfunction. Dr. Bergmann opined that, as Parkinson's symptoms worsen, the tremors begin to interfere with writing, typing, and fine motor tasks, and that by the time a person has had the disease for seven years, most patients become unemployable. When Wilson first presented to Dr. Bergmann, he was suffering from anxiety and had loss of motor control in the right hand.

5. On May 16, 2001, Wilson experienced a major panic attack during a meeting attended by a number of Defendant's employees and officers. Wilson left work and went to the office of Marion Dwight, M.D., the company doctor for Phoenix. Dr. Dwight was also Wilson's family doctor. Wilson did not return to work until sometime in June of 2001. On May 24, 2001, he went to Charleston, South Carolina for treatment by Dr. Bergmann, to whom he was referred by Dr. Dwight. Dr. Bergmann examined Wilson, made appropriate medication adjustments, then released him to return to work without restrictions. When Wilson attempted to return to work, the defendant refused to allow him to return to work and insisted that he needed a release from Dr. Dwight before he could return to work.

6. Dr. Dwight did not examine Wilson between May 17, 2001 and his return to work in June of 2001. Dr. Dwight did not give him a release until at least June 4, 2001 and then he allowed him to work only half days for two weeks. After allowing Wilson to only work half days for two weeks, the defendant finally let Wilson return to full duty about the third week of June, 2001. Hurst had no explanation as to why Phoenix relied on its company doctor rather than Wilson's Parkinson's specialist other than that they wanted him healthy before he returned to work.

7. After Wilson returned to work in June of 2001, the officers of the defendant, Hurst, Wise and Squires, treated him differently. His immediate supervisor, Harry Wise, who used to meet with him on the dock and talk over coffee no longer met with him and refused to look at him. Hurst avoided him

when possible. Hurst required that Wilson report to Wise after returning from each doctor's visit to report on how things went and what was expected. Plaintiff's Exhibit 6 is an example of such a handwritten note from Wilson to Wise regarding his treatment. Hurst monitored healthcare costs for the company, and a color-coded chart was introduced into evidence (Plaintiff's 20) which was prepared by Hurst showing the dates of Wilson's doctor visits for which he had bills and whether those visits were local or out of town. On June 2, 2001, Hurst responded to an internal e-mail from his Human Resources assistant (Crystal Baxley) that Wilson "qualifies for ADA designation and we will have to consider accommodations." (Plaintiff's Exhibit 19) Hurst required Baxley to notify him of any large checks written for health care claims, and Hurst received a report each month showing healthcare costs for the company. Phoenix did not disclose the plaintiff's illness to the stop-loss insurance carrier in its medical questionnaire, but insurance broker, Brandon Guest, indicated that this was not necessary since the Parkinson's Disease had not resulted in substantial medical expense. Guest indicated in Exhibit 49 that, between December 1, 1999 and February 28, 2003, Wilson incurred $9420.35 in medical, prescription, and dental claims. He further indicated that Wilson had never been mentioned in connection with renewal negotiations.

8. In November, 2001 the defendant implemented the Visual system, which was a complex computer system implemented company wide. According to Ray Squires, the Visual system was more difficult on the shipping side than on the manufacturing side. Plaintiff did not receive substantial training regarding that system. Hurst admitted that Wilson tried to master the system, and that many other employees also had problems learning the new system.

9. At no time was the plaintiff ever given a written warning or reprimand regarding his job performance. In addition, he was never told there were any deficiencies in his performance.

10. On Wilson's February 2002 visit to Dr. Bergmann, which was the last visit prior to his termination, the doctor indicated that the disease was "motor-wise in fairly good control" and that Wilson had "good control of his stiffness and tremor". (Bergmann Depo., p. 16). He was suffering from anxiety, depression, and dry eyes. At the doctor visit on August 12, 2002, shortly after his termination, he reported jerking in his sleep. The doctor indicated that frequent urination and sleep problems often occur as the disease progresses, but the evidence is not clear that these problems were present on August 1, 2002.

11. On June 14, 2002, the Defendant's officers met and discussed eliminating two salaried positions, the shipping manager and the press room manager, and putting in their place hourly personnel, with the shipping manager becoming a working foreman. (Plaintiff's Exhibit 18) The Court finds that this was not a reduction in force as the defendant claimed, since only two employees were involved and the company found another job within the company for the press room manager. On June 19, 2002, Hurst met with counsel to discuss all legal issues concerning the "reduction in management"since both the plaintiff and the other employee were over the age of forty. Between June 24 and June 28, the defendant determined that it did not see any role for Wilson to become a foreman.

12. Hurst testified that the plaintiff had requested that the company hire a shipping clerk, but the Court does not find this testimony to be believable. On the contrary, the Court believes the testimony by the plaintiff that Hurst decided in June of 2002 to hire an additional shipping clerk, although the plaintiff did not think the Shipping Department needed another clerk. (This is consistent with Plaintiff's Exhibit 18, which indicates that the employer considered the company "short-handed in hourly personnel.") Wilson interviewed candidates sent by Hurst and recommended hiring an individual who was interviewed and who happened to be in his 50's. Hurst declined to hire him stating he was too close

to retirement and would not be with the company long. (Hurst also made notations on a resume of an individual hired in 1999 wherein he apparently was figuring the employee's age.) Hurst subsequently stated they would hire a candidate who looked big and strong. On June 28, the defendant issued by letter an employment offer for the open position of shipping clerk to Stacy Nix whose application on its face showed that she was 25 years old, had a ninth (9th) grade education, no high school diploma or equivalent and that her last two jobs had been as a waitress at restaurants. A specific requirement for the position was a high school or equivalent education, although Nix had neither. (Nix had just completed the GED exam at the time of her application and had not received the results.) Nix began work on July 8, 2002, after a planned vacation.

13. During July of 2002, Nix underwent training for three weeks until she could handle the shipping clerk position.

14. Hurst held a quarterly meeting on August 1, 2002, with all employees, wherein he mentioned the skyrocketing costs of the defendant's self-insured health insurance. [In fact, the August 2002 medical claims (filed in June and July) were the highest the Company had ever had and totaled $47,656.82; the next closest month only totaled $18,655.92. However, the Court finds that, although Hurst was kept aware by Baxley of large checks written for healthcare claims, he would not have actually received the official August report until after the plaintiff was terminated. In addition, the evidence does not establish that the large claims were for Wilson's healthcare costs.] Later in the day, on August 1, 2002, Wilson was terminated. Defendant advised Wilson through Hurst that it was undergoing a reduction in force; Wilson believed that Hurst was going to terminate Nix, since she was only recently hired and was still in her probationary period. However, he was surprised to hear that his position was the one being eliminated. Plaintiff requested that he be allowed to work in any kind of position, including an

hourly position, but Hurst advised him that an hourly job was not available to him. Within minutes of terminating Plaintiff's employment, Defendant summoned Marviette Hogan, who was in her 50's and had worked in the shipping department more than fourteen (14) years, and promoted her to the position of "shipping foreman". Prior to that date, such a position did not exist in the shipping department. Marviette Hogan did not participate in the Defendant's health insurance, as she was covered under her husband's policy.

15. Interestingly, Eddie Williams, formerly the press room manager, was allowed to stay on as an hourly press room operator, while the plaintiff was not allowed to stay on as an hourly shipping clerk, even though Nix had only been employed there for a few weeks and did not even have the required qualifications at the time she was hired.[2] The Court additionally notes that the plaintiff had worked for the defendant for fourteen years in shipping and, prior to that, had worked in positions for other employers as plant manager over 100 employees for two years and had also worked as a warehouse production manager. Moreover, Hurst's deposition testimony which was published at trial, established that the company's employee handbook provided for transfer of employees to vacant positions, and the company made no effort to allow Wilson to fill the seemingly "phantom" position of another shipping clerk which was posted shortly after his discharge or to place him in Nix's position when she had questionable qualifications and was still in her probationary period.

16. As foreman, Hogan is currently earning $19.50 an hour and also works approximately five hours

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[2] It is also interesting to note that, according to the defendant's EEOC position statement, employee Keith Gavin was discharged in 2001 when the company eliminated fifteen positions. Gavin was allegedly terminated since he was the least effective supervisor and "the least senior supervisor." (Page 2 of Plaintiff's Exhibit 15) It accordingly appears that Phoenix has traditionally attempted to avoid firing senior supervisors, whereas in the case of Wilson, the company did just that. This is yet another piece of evidence that influences the Court's finding that the reason for the plaintiff's discharge was the perceived disability.

of overtime per week at time and a half, resulting in an annual salary of approximately $48,165 per year. Stacie Nix admitted that her supervisor was Ms. Hogan. On Ms. Hogan's evaluation dated July of 2003, completed by Wise, her performance expectation was to "supervise shipping employees . . ." "Marviette is a strict but pleasant supervisor with the ability to get the desired results." (Plaintiff's exhibit 33) Hogan testified that she was told at her first review to have more of a supervision role than a daily task role. This was the same advice which Wilson's supervisor told him in his evaluation. The Court finds that Wilson was replaced by Hogan and not by Nix.

17. It appears to the Court that the defendant did not eliminate the position of shipping supervisor but, in fact, changed the name of the position to "shipping foreman" and made it an hourly position. Marviette Hogan performed all of the duties of Wilson's former position, including supervisory duties.

18. At all times through the date of Wilson's termination, notwithstanding his Parkinson's disease, the Plaintiff was able to perform the essential functions of his job with minimal accommodations. In fact, the defendant states in its position statement to the EEOC that the plaintiff's Parkinson's Disease did not impact his ability to do his job. Plaintiff merely needed some help with writing and he needed a larger computer screen. Although the plaintiff requested a twenty-one inch screen he was given only a seventeen inch screen, the size that other supervisors were given. Plaintiff also asked for assistance with handwriting. He had instructed an employee in his department, Marviette Hogan, to help him write evaluations. Robert Hurst and Harry Wise told Plaintiff he could not use Hogan to write for him. Wilson finally requested assistance from Defendant's Human Resources Assistant, Crystal Baxley, to help write the evaluations. Both Baxley and Hurst knew that Wilson was having problems writing and that these problems were related to his Parkinson's disease. The defendant presented no evidence that these accommodations would have constituted an undue hardship. At the time of his discharge in 2002,

his medical evidence indicates that Wilson's condition was stabilized by medication. In addition, as shown by plaintiff's exhibit 7, the handwritten notes by Wilson regarding supplies which should be ordered, written on August 2, 2002, the plaintiff was still able to write at that time, although apparently with some difficulty. He could also play golf, coach youth sports, and drive.

19. At the time of his termination, Plaintiff was 56 years of age and was earning $46,800.00 per year in base salary. He participated in the 401K plan and was provided medical and dental insurance, disability insurance, and life insurance. The 2002 bonus for supervisors was $4,170.00; the 2003 bonus for supervisors was $8,275.00; and the 2004 bonus for supervisors was $15,600.00. Plaintiff received a raise in 2000 and 2001 and had received a bonus each year. Plaintiff's expert witness gave an opinion regarding the economic losses suffered by the plaintiff as set forth in Plaintiff's Exhibit 48.

20. Hurst, Wise, and Squires began discussing a sale of the company to their children toward the end of 2001. The company was sold to them on October 1, 2002 (two months after the plaintiff's termination) and the company became known as Specialty Washer. Hurst, Wise, and Squires were paid at least $1,000,000 in return for signing covenants not to compete.

21. Defendant filed a response to the EEOC dated April 15, 2003 (Plaintiff's exhibit 15), wherein it stated, inter alia, that the company's sales were down and it was experiencing a significant financial downturn after September 11, 2001; that Wilson delegated many of his responsibilities to Marviette Hogan; that Hogan often ran shipping department meetings; that Plaintiff had not learned to properly operate the computerized time card system; that Plaintiff had allowed Hogan to become the expert with the new system; and that, upon deciding to eliminate the shipping supervisory position, senior management looked for open positions where they could place Plaintiff and allow him the opportunity to retain employment; that the plaintiff ordered ten years of supplies on the day after his discharge; and

that the plaintiff made no effort to master the new Visual computer system. Defendant also stated that Hogan was promoted to a "non-supervisory foreman" position; that the shipping department did not have an immediate need for an hourly employee at the time of the plaintiff's discharge from the supervisory position; that Plaintiff's experience was limited to the shipping department; and that Wilson had been counseled regarding his alleged supervision style of belligerent intimidation, which would cultivate conflict among employees instead of teamwork.

22. Many of Defendant's statements in its April 14, 2003 position statement to the EEOC were not supported by the evidence at trial. Hurst's trial testimony and certain other evidence was simply inconsistent with the statements to the EEOC and, therefore, contributes to this Court's finding the defendant's purported reasons for the termination were pretextual. For example, Hogan admitted that she never ran the shipping department meetings; Plaintiff did not delegate job responsibilities to another employee but rather received some assistance in performing certain functions. Regarding the new Visual computer system, Hurst admitted that although he had difficulties with the new system, Wilson did genuinely make attempts to master the system. Tasks which the defendant complained Wilson could not complete using the company's computer systems were tasks such as input of information which the defendant specifically instructed him not to handle for fear of an entry error. Plaintiff did not order ten (10) years worth of packing supplies the day after his termination. In fact, it appears that someone wrote over the plaintiff's notes after the fact to make it appear that he had intentionally ordered more supplies then necessary. (<u>See</u> Plaintiff's Exhibit 8). Instead, he simply ordered supplies that he felt the company would need over the next several months to help the employer with the transition period after his departure. Senior management did not look for open positions where they could place the plaintiff after they decided to "eliminate" his position. Defendant continued to need a shipping

clerk; in fact, within two (2) weeks after terminating Plaintiff, the company posted an opening for a shipping clerk for which Plaintiff applied. Although Hurst testified that the posting was a mistake, Baxley was on maternity leave at the time, and no one other than Hurst had authority to make such a posting. Defendant did not respond to Wilson's application. The testimony revealed that Hogan signed employee evaluations as a "supervisor", and Nix admitted that Hogan was her supervisor. Although Hogan's job title on her performance evaluation was "shipping foreman", her performance expectations were to "supervise shipping employees to achieve department and company goals while providing appropriate working atmosphere." Contrary to the company's claim of financial difficulties, the company paid bonuses to most employees in 2002, and a profitable sale of the company to family members occurred within months of the plaintiff's termination. In fact, Hogan received a raise soon after she began her new position. Finally, the Court notes the affidavit of Janie Banks submitted by agreement of the parties in lieu of her testimony, which indicates that she denies any allegations by Phoenix that she complained about Wilson as a supervisor and which states that he was a "fair supervisor."

23. At trial, Hurst testified for the first time that Wilson was in effect replaced by the Visual computer system and that this was a reason for his termination. This position had not even been argued to the EEOC.

24. Wilson attempted to locate other employment. He sent resumes to 25-30 companies. He worked as a substitute teacher and performed some yard maintenance work, in addition to working briefly at Edisto Industrial Products. He earned about $3000 in 2002 from employment other than Phoenix, $1250 in 2003, $6547 in 2004, and $7304 in 2005. After his termination, Wilson was able to obtain and purchased health insurance through his wife's employer. Wilson suffered emotional distress from

the discharge and felt embarrassed that he could not support his family. He lost about 20 pounds and could not sleep. He suffered from depression in addition to the depression from the Parkinson's Disease. He was also embarrassed that he had to become a yard man. The Court finds that the plaintiff has incurred lost wages and loss of employee benefits and has also suffered mental anguish and other compensatory damages as a result of the defendant's conduct. The Court further finds that the defendant's conduct was with "reckless indifference" to the plaintiff's federally protected rights.

25. Dr. Bergmann stated that, by the end of 2004 and into 2005, Wilson began to suffer increased symptoms due to his Parkinson's Disease. He also opined that, by seven years of the disease, most patients are "competitively unemployable."

26. The employer regarded the plaintiff as disabled under the ADA, and further, the employer failed to make reasonable accommodations or show undue hardship concerning the same. The Court finds the plaintiff was credible, and he has met his burden of proof on the ADA claim but not as to the remaining claims.

II. Conclusions of Law

Americans with Disabilities Act (ADA)

A. Prima Facie Case

The purpose of the Americans with Disabilities Act (ADA) is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. §12101(b)(1) The Act prohibits employers from discriminating against a qualified individual with a disability with regard to hiring, advancement, or discharge. 42 U.S.C. §12112(a). The ADA prohibits employment discrimination against individuals who are disabled but still capable of performing "the essential functions of [the] job." Rohan v. Networks Presentations,

LLC, 375 F.3d 266 (4th Cir. 2004). The ADA also defines the term "discriminate" as including "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified indivudual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. §12112(b)(5)(A)

To establish a prima facie case of wrongful discharge on the basis of the Americans with Disabilities Act, a plaintiff must show by a preponderance of the evidence that (1) he is within the ADA's protected class; (2) he was discharged; (3) at the time of his discharge, he was performing the job at a level that met the employer's legitimate expectations; and (4) his discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination. Haulbrook v. Michelin N. Am., Inc., 252 F.3d 696, 702 (4th Cir. 2001).

1. Member of ADA's Protected Class

Under the ADA, a person has a covered disability if he has one of the following:

(A) a physical or mental impairment[3] 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 an impairment.

42 U.S.C. §12102(2) (Emphasis added).

[3] "Physical or mental impairment" is defined as:
(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. 29 CFR 1630.2(h)

Under subsection (C), above, a covered disability may be found where the employer believes "that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting." Sutton v. United Air Lines, Inc., 527 U.S. 471, 489 (1999). ". . . Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." Id. See also, Pollard v. High's of Baltimore, Inc., 281 F.3d 462, n. 5 (4th Cir. 2002). Under the applicable regulations, "regarded as having such impairment" is defined, in pertinent part, as: (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation." 29 C.F.R. §1630.2(l)(1). The Fourth Circuit has found that "[i]n order to be eligible for coverage under the ADA, an individual must be perceived as having an impairment that substantially limits one or more 'major life activities'." Cline v. Wal-Mart Stores, Inc., 144 F.3d 294, 302 (4th Cir. 1998). "Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." Id. This list is not intended to be exhaustive. See 29 C.F.R. Pt. 1630, App. §1630.2(h). The phrase "major life activities" refers to "those activities that are of central importance to daily life," Toyota Motor Manufacturing, Kentucky, Inc., v. Williams, 534 U.S. 184, 197 (2002). The plaintiff's abilities with reference to those activities must be "significantly worse than the average person in the general population." EEOC v. Sara Lee Corp, 237 F.3d 349, 352-53 (4th Cir. 2001). An impairment's impact on a major life activity must be "permanent or long-term." Toyota Motor, 534 U.S. at 198.

In the case at bar, the plaintiff has alleged that he suffers from Parkinson's Disease and that his disease affects one or more of the following body systems: neurological, musculoskeletal, and genito-

urinary,[4] which substantially limited the major life activities of seeing, sleep, urination, and performing manual tasks. Plaintiff has additionally pointed to the regulations providing that working is a major life activity which may apply where no other major life activities are present. The Court finds that the plaintiff has not proved that, as of August 1, 2002 (the date of discharge), he satisfied the requirements of 42 U.S.C. §12102(2)(A). Based upon the testimony of Dr. Bergmann, the plaintiff was still able to work on the date of discharge, and his symptoms were fairly well controlled by medication. Therefore, his impairment did not substantially limit any major life activities at that time. However, the Court concludes that Phoenix *regarded* him as having such an impairment under the Act under 42 U.S.C. §12102(2)(C).

An employer's comments referring to an employee as disabled are probative evidence that the employer regarded the employee as disabled under the ADA. E.E.O.C. v. Town & Country Toyota, Inc., 7 Fed. Appx. 226 (4th Cir. 2001), unpublished decision, citing McInnis v. Alamo Comm. College Dist., 207 F.3d 276, 281 (5th Cir. 2000). Under the "regarded as" test, the analysis focuses on the reactions and perceptions of decision-makers working with the employee. Runnebaum v. NationsBank of Md, N.A., 123 F.3d 156, 173 (4th Cir. 1997), *overruled on other grounds*, Bragdon v. Abbott, 524 U.S. 624 (1998).

In the case at bar, an e-mail was introduced into evidence from Ms. Crystal Baxley, HR assistant, to Mr. Hurst dated June 2, 2001 which states: "If Jimmy's condition continues to deteriorate--

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[4] Dr. Kenneth Bergmann is a neurologist employed at the Medical University of South Carolina. He is an associate professor in the department of neurosciences and director of a center for research on Parkinson's Disease. Dep., p. 3. He opined that Parkinson's Disease is a "progressive degenerative disease of the nervous system that involves both motor and non-motor dysfunction." Id., p. 4. Dr. Bergmann indicated that when he first evaluated Wilson on May 24, 2001, he had a "loss of motor control in the right hand." Id., pp. 14-15.

will we have to put him on Family and Medical Leave." Hurst responds:

> Eventually we will . . . since he is salary we have some descression(sic) as to when we assign him FMLA . . . but if he can not do his job/return to work/ then its FMLA time. . . **Jimmy's case is going to be complex since he qualifies for ADA designation and we will have to consider accommodations**. . .

(emphasis added) (Plaintiff's Exhibit 19)

In the e-mail referenced above, Hurst, the company president, specifically stated that Wilson "qualifies for ADA designation". In addition, the defendant ignored the release from Dr. Bergmann, the specialist on Parkinson's Disease, for the plaintiff to return to work after the 2001 panic attack and instead relied on the opinion of the company doctor who had not examined Plaintiff after treatment by Dr. Bergman. Further, Wilson's testimony regarding how the Defendant treated him differently after he suffered the panic attack at work in May 2001, shows the very myths and fears about disability and disease that Congress was trying to address with the ADA. Finally, the testimony revealed that the company officials believed that Wilson was substantially limited in the major life activity of performing manual tasks. This was shown by their belief that he was unable to adequately key information into a computer, write, and count washers. The Court finds that Wilson was perceived by Phoenix as unable to perform a variety of manual tasks central to most people's daily lives. Further, the evidence at trial revealed that the company officials believed that Wilson was substantially limited in the major life activity of seeing. This was shown by their belief that he had difficulty in adequately utilizing the information on the computer screen. The Court accordingly finds that Wilson has established the first element of his prima facie case that he was within the ADA's protected class by being regarded as having an impairment which substantially limits a major life activity, i.e., his impairments resulting from Parkinson's Disease was perceived by the defendant as substantially

limiting the major life activities of seeing and performing manual tasks. It is therefore not necessary to reach the issue of whether the company perceived that the plaintiff's impairment substantially limited the major life activity of working.

2. Discharge from Position at Phoenix

There is no dispute that the plaintiff was discharged; thus, the second element of the prima facie case is satisfied.

3. Performance of Job at Level which Meets Employer's Legitimate Expectations

As to the third element of the plaintiff's prima facie case, the Court finds that, at the time of discharge, the plaintiff was performing his job at a level that met his employer's legitimate expectations. As indicated in this Court's findings of fact, the defendant never formally reprimanded the plaintiff for his job performance. Additionally, although the plaintiff was beginning to have difficulty with his handwriting and other fine motor functions and with reading his computer screen, the evidence indicates that he was still able to perform the essential functions of his supervisory job with the defendant company. As noted above, the defendant's position statement indicates that the plaintiff was able to "perform his job at the same level that he had been prior to being diagnosed." (Page 6 of letter to EEOC, Plaintiff's Exhibit 15)

4. Circumstances that Raise a Reasonable Inference of Discrimination

As to the fourth element of the prima facie case, the Court finds that the plaintiff presented sufficient evidence that the discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination. A reasonable inference of discrimination was created by, among other things, the variation in reasons given for Wilson's discharge, the e-mail, the failure to place Wilson even in a position of shipping clerk, and the inconsistency between the trial evidence and the employer's

position statement to the EEOC. The defendant appeared to have a plan to hire a new shipping clerk and train the new employee, then to fire the plaintiff due to his disability, and finally to re-name his position as a shipping foreman and to promote Ms. Hogan to shipping foreman with the same duties that the plaintiff had as shipping supervisor.

B. Proof of Discrimination by Direct Evidence or Indirect Evidence by the McDonnell Douglas Burden-Shifting Analysis

"As with any claim of discrimination, [plaintiff] is permitted to prove his case by direct or indirect evidence, or by use of the burden-shifting scheme established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)." Cline, 144 F.3d at 303. Direct evidence is evidence showing a "stated purpose to discriminate." Rhoads v. F.D.I.C., 257 F.3d 373, 391 (4th Cir. 2001), cert denied, 535 U.S. 933 (2002). Plaintiff contends that the defendant's statement that it considered the plaintiff's alleged computer limitations when deciding not to place him in another position instead of terminating him constitutes direct evidence of discrimination, since the employer admitted that the plaintiff's problems with typing and viewing the computer screen were related to the Parkinson's Disease. Arguably, the e-mail of June 2001 and the failure of the defendants to accommodate the plaintiff's perceived disability may be considered direct evidence. The Court finds that the plaintiff provided direct evidence of discrimination. However, even if he failed to do so, the plaintiff also prevails under the burden-shifting analysis of McDonnell Douglas. There was more than ample circumstantial evidence of discrimination.

Under McDonnell Douglas, once the plaintiff has established his prima facie case and the employer has articulated a legitimate nondiscriminatory reason for the discharge, the plaintiff then has the burden of proving that the articulated reasons were a pretext for discrimination. Phoenix has defended the allegations under the ADA by alleging that it had legitimate business reasons for the

discharge. However, the Court notes that Phoenix has given different reasons at various times for the discharge. On the date of his discharge, Phoenix informed Wilson that the company was undergoing a reduction in force. In its position statement to the EEOC (plaintiff's exhibit 15), Phoenix took the position that the company's sales had been decreasing and that Wilson had already delegated many of his responsibilities to others in the department and had not learned the computer programs necessary to run the shipping department. At trial, Hurst testified, apparently for the first time, that the Visual computer system had actually replaced Wilson's job functions.

The Court finds that the reasons given by Phoenix were merely a pretext for discrimination. The Court believes that the defendant decided to terminate the plaintiff's position in June of 2002 and instructed the plaintiff to interview shipping clerks, resulting in hiring Nix on June 28, 2002. The defendant then waited until Nix had completed her initial training to discharge Wilson and promote Hogan. In addition, the Court finds that the plaintiff presented sufficient circumstantial evidence to support a finding that the so-called reduction in force (of two employees) was actually concocted to provide an explanation for the plaintiff's discharge when the true reason for the discharge was the plaintiff's perceived disability. Defendant carefully created a situation where it could later argue that it had no position available for Plaintiff.

Therefore, the Court finds that the plaintiff has met his burden of proof that the defendant wrongfully discharged the plaintiff in violation of the ADA.

In addition to his wrongful termination claim under the ADA, the plaintiff has asserted that Phoenix has failed to accommodate his alleged disability. To establish a prima facie case for failure to accommodate, an employee must show: (1) he was an individual with a disability within the meaning of the ADA; (2) the employer had notice of his disability; (3) the employee could perform the essential

functions of the position with reasonable accommodations; and (4) the employer refused to make such accommodations. Rhoads, 257 F.3d at 387, n.11. An employer is not required to provide the employee with an accommodation that constitutes an undue hardship. See Reigel v. Kaiser Foundation Health Plan, 859 F. Supp. 963 (E.D.N.C. 1994). The Court agrees with the plaintiff that the employer in the case at bar failed to provide him with the requested accommodations of assistance with writing and a larger computer screen and that such assistance would not have constituted an undue hardship to the employer. In fact, there is no evidence that such accommodations would create an undue hardship for the employer. The Court therefore finds in favor of the plaintiff on his ADA claim on this basis as well.

Age Discrimination in Employment Act (ADEA)

The ADEA makes it unlawful for an employer "to discharge any individual . . . because of such individual's age." 29 U.S.C.A. § 623(a)(1). An ADEA claim may be established through two alternative methods of proof: (1) a "mixed-motive" framework, requiring evidence that the employee's age motivated the employer's adverse decision, or (2) a "pretext" framework identical to the McDonnell Douglas burden-shifting analysis used in Title VII cases. EEOC v.Warfield-Rohr Casket Co., 364 F.3d 160, 163-164 (4th Cir. 2004).

The plaintiff asserts that, under a mixed-motive analysis, Hurst has made comments concerning the hiring of shipping clerks and made notations on an applicant's resume that reveal his use of age in making employment decisions. However, the Court finds that the plaintiff has not presented sufficient evidence that age was a "motivating factor" in Phoenix's decision to terminate him. See, e.g., Warfield-Rohr Casket, 364 F.3d at 163 (4th Cir. 2004).

The McDonnell Douglas approach requires proof for a prima facie case that "(1) [the plaintiff]

is a member of the protected class;[5] (2) he was qualified for the job and met [the company's] legitimate expectations; (3) he was discharged despite his qualifications and performance; and (4) following his discharge, he was replaced by a substantially younger individual with comparable qualifications." Warch v. Ohio Casualty Insurance Co., 435 F.3d 510, 513 (4th Cir. 2006). "After the plaintiff establishes a prima facie case, the burden shifts to the employer to produce a legitimate, non-discriminatory reason for the termination." Id. at 513-14. Then, if the employer produces a legitimate, non-discriminatory reason for the discharge decision, the plaintiff must prove that the reason given was pretextual.

The Court finds, based upon the evidence presented, that the plaintiff has not proved the fourth element of the prima facie case, i.e., the plaintiff was replaced with a substantially younger individual with comparable qualifications. The plaintiff was replaced by Marviette Hogan, who was also in her fifties and thus also protected by the ADEA. Although the plaintiff did in fact hire twenty-five year old Stacey Nix as shipping clerk and subsequently promote Ms. Hogan, the Court does not believe that Ms. Nix replaced the plaintiff. Therefore, the Court does not believe that the plaintiff was discharged because of his age but because of his being regarded as disabled. Therefore, the Court finds that the company did not violate the ADEA.

Employee Retirement Income Security Act (ERISA)

Wilson contends that he was fired "because of his health problems"and the "effect that these health problems had on the defendant's premium rates for its health insurance." Plaintiff further alleges that the termination "was specifically geared towards denying Plaintiff the opportunity to be enrolled in the Defendant's health insurance E.R.I.S.A. benefit plan." (Complaint, Paragraph XI) At trial, the

[5] At the time the plaintiff was hired, he was already a member of the protected class.

plaintiff also appeared to assert that the plaintiff was discharged in an effort to prevent him from becoming eligible for disability benefits. Plaintiff contends that the defendant failed to disclose Wilson's Parkinson's Disease to insurers under a stop-loss plan and that this is evidence that Wilson was fired to prevent him from receiving benefits.

The Court finds that judgment should be granted to the defendant on the ERISA claim since the plaintiff has not shown sufficient evidence of specific intent to interfere with his ERISA rights. Section 510 of ERISA makes it unlawful for any person to discharge, discipline or discriminate against a participant or beneficiary "for exercising any rights to which he is entitled under the provisions of an employee benefit plan . . . **or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan**. . . " § 510, codified at 29 U.S.C. § 1140 (emphasis added) To prevail on his ERISA claim, the plaintiff need only "adduce facts, which if taken as true, could enable a jury to identify unlawful intent from other various reasons why an employer might have terminated the plaintiff, and to conclude that the employer harbored the requisite intent." Conkwright v. Westinghouse Electric Corp., 933 F.2d 231, 239 (4th Cir. 1991). A plaintiff may utilize direct proof if available or, if not, the "McDonnell Douglas scheme of presumptions and shifting burdens of production." Id.

The Court finds that, although Hurst monitored health care costs closely, the total August healthcare costs would not have been known on August 1, 2002, when the plaintiff was discharged. In addition, the testimony of Brandon Guest, insurance broker, was credible regarding the fact that it would not have been necessary for the company to disclose the plaintiff's Parkinson's disease to the stop-loss carrier, since it had not resulted in excessive expenses. Moreover, Guest indicated that the claims for Wilson between December 1, 1999 and February 28, 2003 totalled only $9420.35 and that Wilson was

never mentioned in connection with renewal negotiations for the coverage. (Plaintiff's Exhibit 49) While the Court believes the medical costs may have been an overlapping concern to some extent, along with his perceived disability, the Court is not convinced there was a specific intent to interfere with his ERISA rights. Therefore, the Court does not believe that the plaintiff has proved his case under ERISA.

Breach of Contract

Plaintiff introduced the company's policy manual into evidence as his exhibit 1. However, in his proposed findings of fact and conclusions of law submitted to this Court, the plaintiff proposed a finding by this Court that any promises contained in the policy manual do not rise to the level of a progressive disciplinary policy in mandatory terms as required by Conner v. City of Forest Acres, 348 S.C. 454, 560 S.E.2d 606 (2002). Apparently, the plaintiff concedes this cause of action. Based on the evidence presented, this Court determines that the plaintiff was an employee at will of Phoenix and that he has not presented sufficient evidence to prevail on this cause of action. Accordingly, this Court finds that Wilson's state law breach of contract claim fails.

III. Damages

The plaintiff has established that he was terminated in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101 et. seq. ("ADA"). The ADA expressly incorporates the remedies available under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-4, 2000e-5, 2000e-6, 2000e-8, 2000e-9. 42 U.S.C. § 12117(a). Title VII and the Civil Rights Act of 1991 authorize the Court to order reinstatement, back and front pay where appropriate, compensatory damages, and punitive damages. Here, as discussed below, the Court finds that the plaintiff has set forth sufficient evidence to support a claim of back pay, compensatory damages, and punitive damages. The Court declines to make an award of front pay for the reasons stated below.

Back Pay

"Back pay is awarded in furtherance of the objectives of Congress in enacting Title VII to create employer incentives to ensure equality of employment opportunities and to make persons whole for injuries suffered on account of unlawful discrimination." Albermarle Paper Co. v. Moody, 422 U.S. 405, 418-19, 95 S.Ct. 2362 (1975). The formula for an award of back pay is the difference between the salary and wages actually received and those the employee would have received had there been no discrimination. See, e.g., Ford v. Rigidply Rafters, 984 F.Supp. 386, 389 (D. Md. 1997). Forms of employee compensation such as cost-of-living increases, medical insurance, and other benefits may also be awarded. See Spagnuolo v. Whirlpool Corp., 550 F. Supp. 432, 434 (W.D.N.C. 1982), *rev'd on other grounds*, 717 F.2d 114 (4th Cir. 1983). The plaintiff, nevertheless, has a duty to mitigate back pay damages by making reasonable efforts to locate other employment. Ford Motor Co. v. EEOC, 458 U.S. 219, 231 (1982).

Here, the Court finds that the plaintiff is entitled to back pay from August 2002 through the end of 2005. Although Wilson has requested back pay through the date of the hearing in this case on April 19, 2006, the Court finds that based on the testimony of the plaintiff's own expert, Dr. Bergmann, the plaintiff would not have been able to perform his position at Phoenix after 2005.

> Q: And I believe you said earlier in your testimony that by seven years of the disease that most patients will become competitively unemployable. Where will that seven-year point be for Mr. Wilson based on your understanding of his disease?
> A. That's hard to say although he's clearly on his way in the sense that what, as we said before, what makes people unemployable is this on off syndrome where they can't rely upon the effect of the medication. And when it does work it does not return them to normal. **He's now in his, the last visit in October[2005], the sixth year of disease.**

Bergmann, Depo. dated April 12, 2006, p. 23.

Notably, the plaintiff was diagnosed with Parkinson's Disease in 1998. Plaintiff's expert, Dr. Bergmann, is helpful to the plaintiff, but also limiting to an extent. The plaintiff has not offered any evidence to show that, after that seven year period ending in 2005, the plaintiff could perform the essential functions of his job, even with reasonable accommodations. Therefore, the Court finds that the award of back pay should end in 2005.

The Plaintiff's expert in Plaintiff's Exhibit 48 calculated Plaintiff's back pay amount by taking into consideration an assumption of a two (2%) percent salary increase per year and factored in the amounts of bonuses received by employees after the plaintiff's discharge. Plaintiff's expert also factored in the estimated value of certain other benefits, including employer 401(k) contributions and other benefits which defendant provided and which were set forth in Plaintiff's Exhibits 1, 4 and 5. Plaintiff's expert reviewed the Defendant's plan descriptions, bonuses, 401(k), insurance and history of salary increases. In calculating the back pay award, plaintiff's expert took into consideration the sums the plaintiff was able to earn in mitigation after his termination. Defendant did not take issue with the plaintiff's mitigation amounts. The Court notes that the expert has included the value of the medical benefits provided by Phoenix in his computations. However, since the plaintiff mitigated his damages (as he was required to do) by obtaining other medical insurance through his wife's employment, the Court has deducted the value of the medical insurance from the back pay award. The Court further finds that, since the plaintiff was employed at Phoenix through July of 2002, he was paid for 58% of the year. Therefore, the present value of his expected income and benefits for the remaining period of 2002 (not including expected medical) was $23,480 instead of the figure of $67,246 shown on Exhibit 48 for age 56.

Based on the testimony and evidence presented, I find and conclude that plaintiff is entitled

to an award of back pay in the amount of $199,791, less the mitigation amount of $22,008, resulting in a total award of back pay of $177,783.

Front Pay

Front pay is an equitable remedy and provides redress for the loss of future employment beyond the date of judgment as a result of past discrimination. Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843 (2001). While reinstatement is the preferred remedy, front pay may be awarded in an appropriate case. "Because of the potential for windfall, however, its use must be tempered." Duke v. Uniroyal Inc., 928 F.2d 1413, 1424 (4th Cir. 1991). The Court finds that Plaintiff is not entitled to an award of front pay.[6] As noted above, the court finds that the plaintiff's medical condition would not have allowed him to work after 2005.

Compensatory and Punitive Damages

Under the ADA, compensatory damages are available for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses. . . " See Cline, 144 F.3d at 304, quoting 42 U.S.C. § 1981a(b)(3). The ADA incorporates Title VII's statutory caps on compensatory and punitive damages. 42 U.S.C. §12117(a). Defendant had 94 employees in 2002. The amount of the cap for compensatory and punitive damages is $50,000.00 for employers of the size of the defendant. 42 U.S.C. §1983a(b)(3).

Compensatory damages may be recovered by the plaintiff in a case in which intentional discrimination has been demonstrated. 42 U.S.C. § 1981a(a).

Here, through his testimony and through the records of Dr. Bergmann, (Exhibit 45), the

[6] In the case at bar, the plaintiff has not requested reinstatement. Some courts require such a request in order to preserve a claim for front pay. See Xiao-Yue Gu v. Hughes Stx Corp., 127 F. Supp.2d 751, 759 (D. Md. 2001).

plaintiff has proven specific harm to his emotional state. He testified regarding his loss of sleep, humiliation, inability to eat and exacerbated depression as a result of his termination; he also testified to the humiliation he felt when he had to resort to doing yard work in plain view of his small community when he could not find other work. The court finds that the evidence is sufficient to establish that compensatory damages are warranted. The plaintiff is awarded $10,000 in compensatory damages.

With the passage of the Civil Rights Act of 1991, the ADA entitles a plaintiff to punitive damages if "the respondent engaged in a discriminatory practice . . . with malice or with reckless indifference to the [plaintiff's] federally protected rights." 42 U.S.C. § 1981a(b)(1). Punitive damages are designed to "punish and deter particularly egregious conduct." Cline, 144 F.3d at 306. The Court finds that the defendant considered that the plaintiff "qualifies for ADA designation" and developed a plan to terminate him. This was done with reckless indifference to Wilson's federally protected rights.

Therefore, the Court finds that an award of punitive damages of $10,000 is warranted.

IV. Conclusion

For the reasons stated, the Court hereby orders that judgment shall be entered in favor of the plaintiff and against the defendant on the cause of action under the ADA in the amount of $177,783 in back pay; $10,000 in compensatory damages, and $10,000 in punitive damages. Judgment shall be entered in favor of the defendants as to all remaining causes of action.

To the extent that the plaintiff seeks an award of attorney's fees and costs as may be permitted by statute, counsel is instructed to file an appropriate motion, accompanying memorandum, and affidavit in support thereof and to comply with the local rules regarding such request.

AND IT IS SO ORDERED.

s/R. Bryan Harwell
R. Bryan Harwell
United States District Judge

June 21, 2006
Florence, South Carolina