Hargett v. Jefferson Cty. Bd. of Educ.

United States Court of Appeals for the Sixth Circuit

October 27, 2017, Filed

No. 17-5368

Reporter
2017 U.S. App. LEXIS 21799 *; 33 Am. Disabilities Cas. (BNA) 1278

AVADAWN HARGETT, Plaintiff-Appellant, v. JEFFERSON COUNTY ***BOARD*** OF ***EDUCATION***, Defendant-Appellee.

Notice: NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. *SIXTH CIRCUIT RULE 28* LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE *RULE 28* BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

Prior History: [*1] ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY.

*Hargett v. Jefferson County **Bd.** of **Educ.**, 2017 U.S. Dist. LEXIS 33764 (W.D. Ky., Mar. 9, 2017)*

Core Terms

disability, accommodation, reasonable accommodation, teaching, restrictions, return to work, district court, monitoring, granting summary judgment, essential function, rights, teaching position, retaliation, duties, constructive discharge, teaching assistant, replaced, requests, knee, walk, adverse employment action, interactive process, summary judgment, medical leave, conditions, morning, teacher, grade

Case Summary

Overview
HOLDINGS: [1]-A former elementary school teacher's ADA claim failed because she did not show that she was otherwise qualified for her position after the date that her application for disability retirement benefits was accepted and she was determined to be disabled for purposes of working at any other teaching position in the state; [2]-The teacher's ADA claim of a failure to accommodate her disability to return her to her third-grade teaching position failed because she flatly rejected the school's proposal of a wheelchair and instead, she insisted on her suggested accommodation of a teaching assistant to be on call during her class moves; [3]-The teacher's ADA failure to accommodate claim with respect to hall monitoring duties also failed because she never proposed a reasonable accommodation, and she rejected the school's choice of a reasonable accommodation for this duty.

Outcome
Decision affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

HN1[] **Summary Judgment Review, Standards of Review**

Appellate courts review de novo a district court's grant of summary judgment.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

HN2[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is proper where there is no genuine dispute as to any material fact and the movant is entitled

to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*.

Civil Procedure > ... > Summary
Judgment > Burdens of Proof > Movant Persuasion & Proof

HN3 **Burdens of Proof, Movant Persuasion & Proof**

On summary judgment, a moving party bears the initial burden of establishing an absence of evidence to support the nonmoving party's case.

Civil Procedure > ... > Summary
Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

HN4 **Burdens of Proof, Nonmovant Persuasion & Proof**

A party opposing a motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial.

Civil Procedure > Judgments > Summary
Judgment > Evidentiary Considerations

HN5 **Summary Judgment, Evidentiary Considerations**

When ruling on a motion for summary judgment, courts consider the evidence in the light most favorable to the party opposing the motion.

Business & Corporate Compliance > ... > Discrimination > Disability Discrimination > Federal & State Interrelationships

Business & Corporate Compliance > ... > Discrimination > Disability Discrimination > Scope & Definitions

HN6 **Disability Discrimination, Federal & State Interrelationships**

Under the Americans with Disabilities Act (ADA), an employer cannot discriminate against a qualified individual on the basis of disability in regard to the terms, conditions, privileges, or termination of employment. *42 U.S.C.S. § 12112(a)*. This same language is set forth in the Kentucky Civil Rights Act (KCRA), *Ky. Rev. Stat. Ann. § 344.040(1)(a)*. Because the language of the KCRA mirrors that of the ADA, courts analyze both claims under the ADA framework.

Business & Corporate Compliance > ... > Disability Discrimination > Reasonable Accommodations > Undue Hardship

Labor & Employment Law > ... > Evidence > Burdens of Proof > Burden Shifting

Labor & Employment Law > ... > Evidence > Burdens of Proof > Employee Burdens of Proof

HN7 **Reasonable Accommodations, Undue Hardship**

An employer discriminates within the meaning of *42 U.S.C.S. § 12112(a)* when it fails to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business. *42 U.S.C.S. § 12112(b)(5)(A)*. To establish a prima facie case of failure to accommodate under *§ 12112(b)(5)(A)*, an employee must show that: (1) she is disabled within the meaning of the *Americans with Disabilities Act*; (2) she is otherwise qualified for the position, such that she can perform the essential functions of the job with or without a reasonable accommodation; (3) the employer knew or had reason to know of her disability; (4) the employee requested an accommodation; and (5) the employer failed to provide a reasonable accommodation thereafter. Once an employee establishes a prima facie case, the burden shifts to the employer to demonstrate that any particular accommodation would impose an undue hardship on the employer.

Civil Procedure > ... > Summary
Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Labor & Employment Law > ... > Evidence > Burdens of Proof > Employee Burdens of Proof

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN8 **Burdens of Proof, Nonmovant Persuasion & Proof**

An application for disability is not conclusive evidence that an individual is completely incapable of working. However, an *Americans with Disabilities Act*, *42 U.S.C.S. §§ 12101-12213*, plaintiff cannot simply ignore the apparent contradiction that arises out of a total disability claim but must proffer a sufficient explanation. To survive summary judgment in such a case, the plaintiff is required to explain how she could still perform the essential functions of her position with a reasonable accommodation when the disability determination allegedly failed to take this factor into account. An appellate court will not consider a plaintiff's proposed explanation for the discrepancy between her request to return to work and the disability determination for the first time on appeal.

Business & Corporate Compliance > ... > Discrimination > Disability Discrimination > Reasonable Accommodations

HN9 **Disability Discrimination, Reasonable Accommodations**

A "reasonable accommodation" may include: making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and job restructuring, reassignment to a vacant position, acquisition or modifications of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies or other similar accommodations for individuals with disabilities. *42 U.S.C.S. § 12111(9)(A)-(B)*.

Business & Corporate Compliance > ... > Disability Discrimination > Reasonable Accommodations > Interactive Process

HN10 **Reasonable Accommodations, Interactive Process**

To determine the appropriate reasonable accommodation it may be necessary for the employer to initiate an informal, interactive process with the employee. *29 C.F.R. § 1630.2(o)(3)*. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations. *29 C.F.R. § 1630.2(o)(3)*. This interactive process is mandatory, and both parties have a duty to participate in good faith. An employer has sufficiently acted in good faith when it readily meets with the employee, discusses any reasonable accommodations, and suggests other possible positions for the plaintiff. The disabled employee bears the burden of proposing an accommodation and showing that it is objectively reasonable, but where there is more than one reasonable accommodation, the choice of accommodation is the employer's. An employee who declines an offered reasonable accommodation forfeits the status as a qualified individual with a disability.

Business & Corporate Compliance > ... > Disability Discrimination > Reasonable Accommodations > Undue Hardship

HN11 **Reasonable Accommodations, Undue Hardship**

The *Americans with Disabilities Act*, *42 U.S.C.S. §§ 12101-12213*, does not require employers to hire a second person to fulfill the job responsibilities ordinarily performed by one person.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN12 **Reviewability of Lower Court Decisions, Preservation for Review**

When a party failed to raise an argument in the district court, a reviewing court will not consider it for the first time on appeal.

Labor & Employment Law > ... > Disability Discrimination > Scope & Definitions > Qualified Individuals With Disabilities

HN13 **Scope & Definitions, Qualified Individuals With Disabilities**

Under the *Americans with Disabilities Act*, *42 U.S.C.S. §§ 12101-12213*, regulations, several factors may be considered in determining whether a job function is essential, including the employer's judgment as to which functions are essential; the consequences of not requiring the incumbent to perform the function; the work experience of past incumbents in the job; and the current work experience of incumbents in similar jobs. *29 C.F.R. § 1630.2(n)*.

Labor & Employment Law > ... > Constructive Discharge > Statutory Application > Americans With Disabilities Act

Labor & Employment Law > ... > Disability Discrimination > Employment Practices > Discharges & Failures to Hire

Labor & Employment Law > ... > Evidence > Burdens of Proof > Employee Burdens of Proof

Labor & Employment Law > Wrongful Termination > Constructive Discharge > Burdens of Proof

***HN14*[] Statutory Application, Americans With Disabilities Act**

To prevail on a claim for discriminatory discharge under the *Americans with Disabilities Act*, *42 U.S.C.S. §§ 12101-12213*, an employee is required to show that: (1) she was disabled; (2) she was otherwise qualified to perform the essential functions of her position, with or without reasonable accommodation; (3) she suffered an adverse employment action; (4) the employer knew or had reason to know of her disability; and (5) the position remained open or a non-disabled person replaced her. Constructive discharge qualifies as an adverse employment action under the ADA. To show a constructive discharge, the employee is required to show that working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign. In the failure-to-accommodate context, a complete failure to accommodate, in the face of repeated requests, might suffice as evidence to show the deliberations necessary for constructive discharge.

Labor & Employment Law > Leaves of Absence > Family & Medical Leaves > Burdens of Proof

Labor & Employment Law > ... > Retaliation > Statutory Application > Family & Medical Leave Act

***HN15*[] Family & Medical Leaves, Burdens of Proof**

The *Family and Medical Leave Act (FMLA)*, *29 U.S.C.S. §§ 2601-2654*, entitles an eligible employee to as many as 12 weeks of unpaid leave during any twelve-month period if the employee has a serious health condition that makes the employee unable to perform the functions of the position of such employee. There are two theories of *FMLA* liability against employers: the interference theory and the retaliation theory. The interference theory arises from *29 U.S.C.S. § 2615(a)(1)*, which states that it shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided in this subchapter. *29 U.S.C.S. § 2615(a)(1)*. The retaliation theory arises from *29 U.S.C.S. § 2615(a)(2)*, which provides that it shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter. *29 U.S.C.S. § 2615(a)(2)*.

Labor & Employment Law > Leaves of Absence > Family & Medical Leaves > Burdens of Proof

***HN16*[] Family & Medical Leaves, Burdens of Proof**

To prevail on an *Family and Medical Leave Act (FMLA)*, *29 U.S.C.S. § 2615(a)(1)*, interference claim, a plaintiff must show that (1) she was an eligible employee; (2) the defendant was an employer as defined under the *FMLA*; (3) the employee was entitled to leave under the *FMLA*; (4) the employee gave the employer notice of her intention to take leave; and (5) the employer denied the employee *FMLA* benefits to which she was entitled. Interference also encompasses actions by an employer that discourage an employee from using *FMLA* leave. *29 C.F.R. § 825.220(b)*.

Labor & Employment Law > ... > Retaliation > Elements > Adverse

Employment Actions

Labor & Employment
Law > ... > Retaliation > Statutory Application > Family & Medical Leave Act

Labor & Employment
Law > Discrimination > Retaliation > Burdens of Proof

Labor & Employment
Law > ... > Retaliation > Elements > Causation

HN17 **Elements, Adverse Employment Actions**

To establish a prima facie case of *Family and Medical Leave Act (FMLA)*, *29 U.S.C.S. § 2615(a)(2)*, retaliation, a plaintiff is required to show that (1) she engaged in an activity protected by the *FMLA*, (2) the exercise of her right was known to the employer, (3) the employer thereafter took an employment action adverse to the employee, and (4) there was a causal connection between the protected activity and the adverse employment action.

Labor & Employment
Law > Discrimination > Retaliation > Burdens of Proof

Labor & Employment
Law > ... > Retaliation > Statutory Application > Family & Medical Leave Act

Labor & Employment Law > Leaves of Absence > Family & Medical Leaves > Burdens of Proof

HN18 **Retaliation, Burdens of Proof**

Under the *Family and Medical Leave Act (FMLA)*, *29 U.S.C.S. § 2615(a)(1)*, interference theory, because the issue is the right to an entitlement, the employee is due the benefit if the statutory requirements are satisfied, regardless of the intent of the employer. In contrast, the employer's motive is an integral part of the analysis for retaliation claims because they impose liability on employers that act against employees specifically because those employees invoked their *FMLA* rights.

Labor & Employment Law > ... > Family & Medical Leaves > Scope & Definitions > Employee Leave Requirements

HN19 **Scope & Definitions, Employee Leave Requirements**

Under the *Family and Medical Leave Act (FMLA)*, an employer's obligation is limited to 12 weeks of *FMLA* leave during any 12-month period for a serious health condition. *29 U.S.C.S. § 2612(a)(1)(D)*.

Labor & Employment Law > Leaves of Absence > Family & Medical Leaves > Burdens of Proof

HN20 **Family & Medical Leaves, Burdens of Proof**

Interference with an employee's *Family and Medical Leave Act (FMLA)*, *29 U.S.C.S. § 2615*, rights does not constitute a violation if the employer has a legitimate reason unrelated to the exercise of *FMLA* rights for engaging in the challenged conduct.

Labor & Employment Law > Leaves of Absence > Family & Medical Leaves > Burdens of Proof

HN21 **Family & Medical Leaves, Burdens of Proof**

In a *Family and Medical Leave Act*, *29 U.S.C.S. § 2615*, interference claim, where the employer presents a legitimate, non-discriminatory reason to justify its action, the employee is required to rebut it by a preponderance of the evidence showing that the proffered reason (1) had no basis in fact, (2) did not actually motivate the defendant's challenged conduct, or (3) was insufficient to warrant the challenged conduct.

Counsel: For AVADAWN HARGETT, Plaintiff - Appellant: Michele D. Henry, Craig Henry, Louisville, KY.

For JEFFERSON COUNTY ***BOARD*** OF ***EDUCATION***, Defendant - Appellee: Christopher Tyson Gorman, Amanda Warford Edge, Wyatt, Tarrant & Combs, Louisville, KY.

Judges: Before: GUY, MOORE, and GILMAN, Circuit Judges.

Opinion

ORDER

Avadawn Hargett, a Kentucky resident, appeals the district court's order granting summary judgment in favor of the defendant, the Jefferson County ***Board*** of ***Education*** (JCBE). The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See Fed. R. App. P. 34(a)*.

Hargett filed her complaint under the *Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213*, the *Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601-2654*, and the *Kentucky Civil Rights Act (KCRA)*. Hargett claimed that the defendant violated her rights by refusing to offer a reasonable accommodation to allow her to continue to teach in her previous position at an elementary school within Jefferson County, constructively discharged her, interfered with her right to request leave under the *FMLA*, and retaliated against her for exercising her rights under the *FMLA*. The district **[*2]** court granted summary judgment in favor of JCBE, and Hargett timely appealed. Hargett argues that the district court erroneously granted summary judgment in favor of the defendant on all of her claims.

Underlying Facts

In 1987, Hargett began her employment with the Jefferson County Public Schools and, in 2007, she began teaching third grade at Audubon Elementary School. In May 2013, Hargett was granted leave under the *FMLA* through August 27 because she was scheduled for knee surgery. After her surgery, Dr. Joseph Catalano, her treating orthopedic specialist, determined that she could not return to work until October 6, and then only if she avoided prolonged standing or walking. Hargett alleged that Audubon's Assistant Principal, Tiffany Marshall, informed her that she would not be permitted to return to work until these restrictions were removed. Hargett then submitted a note from Dr. Catalano, dated October 4, indicating that she could return to work without restrictions on January 1, 2014.

Because this period of leave would have extended beyond the ninety days authorized by the *FMLA*, Marshall began interviewing to replace Hargett at Audubon in accordance with the collective bargaining **[*3]** agreement between JCBE and the Jefferson County Teachers Association (JCTA). The Jefferson County Schools notified Hargett that it would update her medical leave until January 6, 2014, and instructed her to contact them for her assignment upon her return. A new teacher was hired as her replacement and began teaching on October 19, 2013.

On November 4, Dr. Catalano wrote another note that he indicated "superseded any prior note," stating that Hargett could return to work on November 6, 2013, with the restrictions of no prolonged walking or standing. At that point, Marshall and the JCBE offered Hargett a first-grade teaching position at Audubon, but she rejected the offer. About this same time, Hargett requested the following accommodations for returning to her third-grade classroom at Audubon: (1) the ability for her class to walk with another class and teacher to the lunchroom and recess because she walked slowly, (2) a teaching assistant or parent volunteer to walk with her and her class to the computer lab and assist her during bathroom breaks, and (3) a teaching assistant or parent volunteer to help her during fire drills. Hargett admitted that she did not know if any teaching assistants **[*4]** or parent volunteers would have been available for these duties.

Bill Allison, a representative for the JCTA, contacted the Jefferson County Schools on Hargett's behalf, demanding that she be immediately returned to her job at Audubon. Rob Tanner, Director of Labor Management and Employee Relations, responded that, under the ADA, Hargett's disability was not qualifying because it was transitory according to Dr. Catalano's reports that she would be available to work with no restrictions as of January 1, 2014. In addition, Tanner noted that Hargett's requested accommodations were not reasonable. Notwithstanding Tanner's response that the ADA did not require the defendant to offer a reasonable accommodation, the defendant offered Hargett the use of a wheelchair during the times that she was required to mobilize in the hallway with her class or to stay in one place for prolonged periods. Hargett rejected this accommodation on the bases that she believed that her doctor wanted her to "move around" to facilitate flexibility in her knee, that a wheelchair would be difficult to use in her classroom, and that she could use a cane instead.

On January 8, 2014, Allison sent an e-mail to Tanner, **[*5]** notifying him that Hargett was "ready and available for placement at another school" and "will accept any class above the 3rd grade." The next day,

Hargett was assigned to an eighth grade class at Kammerer Middle School, and she began teaching there on January 13. Hargett used a cane as needed, and the school provided her with a high stool that could accommodate her knee condition while teaching in the classroom.

In February 2014, Hargett was asked to begin monitoring the hall in the morning between classes. Hargett testified that when she accepted the Kammerer position, she was never informed about this responsibility. However, Assistant Principal Carolyn Smith stated in an affidavit that she informed Hargett about hall monitoring when she began her job at Kammerer and that Hargett did not object or inform Smith about any restrictions that would preclude her from performing this duty. Hargett claimed that, in light of her small stature, she was concerned about reinjuring her knee when standing in the middle of a busy hall with the "students rushing in both directions." The principal at Kammerer, David Armour, initially allowed Hargett to monitor the halls in the afternoon when they **[*6]** were less crowded, but Assistant Principal Smith insisted that Hargett perform this duty in the morning. However, Smith offered Hargett the accommodations of permitting her to pace the hallways during class changes to avoid prolonged standing, using a stool to sit during monitoring, or standing or leaning against a wall in a small alcove near her assigned post near her classroom.

In April 2014, Hargett submitted a note from Dr. Catalano stating that she was "to avoid hall duty to reduce the risk of re-injury to the knee." Upon receipt of this note, the Leave Administrator for Jefferson County Schools, Toni Kelman, instructed that Hargett should not return to work until her doctor lifted her restrictions. Hargett was then sent home for two days, for which she was eventually paid, while Kelman contacted Dr. Catalano's office to clarify Hargett's restrictions. The doctor, through his nurse practitioner, informed Kelman that Hargett could perform her hall duty with the accommodation of a stool so that she could sit down. Hargett returned to work, and Principal Armour permitted her to perform her hall monitoring in the afternoon for the remainder of the year. At the end of the school year, **[*7]** however, Smith informed Hargett that she would be required either to perform hall monitoring in the morning the following year or to take medical leave. Hargett stated that, based on Smith's statement, she decided to apply for disability retirement so that she could retain health insurance coverage, rather than apply for medical leave.

In June 2014, Hargett submitted her application for disability retirement benefits to the Kentucky Teachers' Retirement System, supported by four physicians' certifications stating that she was disabled. On her application, Hargett responded "yes" to the question of whether her condition rendered her "incapable of carrying out [her] duties." Each of the physicians indicated that, even with corrective measures, they did not expect Hargett to be able to return to work and that Hargett was disabled from physically performing her job duties. Dr. Catalano specifically stated that Hargett's knee problems would render her "unable to walk or stand for any extended period of time." Her application was approved with an effective date of July 1, 2014.

Analysis

HN1[⬆] We review de novo the district court's grant of summary judgment. *Younis v. Pinnacle Airlines, Inc., 610 F.3d 359, 361 (6th Cir. 2010)*. ***HN2***[⬆] Summary judgment is proper where "there **[*8]** is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*; *accord Defoe ex rel. Defoe v. Spiva, 625 F.3d 324, 330 (6th Cir. 2010)*. ***HN3***[⬆] The moving party bears the initial burden of establishing an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. ***HN4***[⬆] The party opposing the motion for summary judgment "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. ***HN5***[⬆] When ruling on a motion for summary judgment, we consider the evidence "in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (quoting *United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962)*).

I. ADA and KCRA Claims

HN6[⬆] Under the ADA, an employer cannot discriminate against a qualified individual on the basis of disability in regard to the terms, conditions, privileges, or termination of employment. *42 U.S.C. § 12112(a)*. This same language is set forth in *Kentucky Revised Statute Annotated § 344.040(a)(1)*. Because the language of the KCRA mirrors that of the ADA, we analyze both

claims under the ADA framework. *See* Brohm v. JH Props., Inc., 149 F.3d 517, 520 (6th Cir. 1998).

HN7[] An employer discriminates within the meaning of *§ 12112(a)* when it fails to make "reasonable accommodations to the known physical or mental limitations" of an otherwise qualified employee, unless the employer "can demonstrate that the accommodation would impose **[*9]** an undue hardship on the operation of the business." *42 U.S.C. § 12112(b)(5)(A)*. To establish a prima facie case of failure to accommodate under *§ 12112(b)(5)(A)*, an employee must show that: (1) she is disabled within the meaning of the ADA; (2) she is otherwise qualified for the position, such that she can perform the essential functions of the job with or without a reasonable accommodation; (3) the employer knew or had reason to know of her disability; (4) the employee requested an accommodation; and (5) the employer failed to provide a reasonable accommodation thereafter. *See* Kleiber v. Honda of Am. Mfg., Inc., 485 F.3d 862, 869 (6th Cir. 2007). Once an employee establishes a prima facie case, "the burden shifts to the employer to demonstrate that any particular accommodation would impose an undue hardship on the employer." *See* Johnson v. Cleveland City Sch. Dist., 443 F. App'x 974, 983 (6th Cir. 2011).

A. Alleged Discrimination after July 1, 2014

The district court first determined that Hargett failed to meet her burden of showing that she was "otherwise qualified" for her position after July 1, 2014, because, as of that date, she was determined to be disabled for purposes of working at any teaching position in Kentucky. Hargett argues that the physicians' certifications did not establish that she was not otherwise qualified because the forms that they completed **[*10]** did not reveal whether they were aware of her teaching duties and did not provide a means for them to describe any accommodations that might have allowed her to continue teaching.

HN8[] An application for disability is not "conclusive evidence that an individual is completely incapable of working." Stallings v. Detroit Pub. Sch., 658 F. App'x 221, 226 (6th Cir. 2016), *cert. denied*, *137 S. Ct. 648, 196 L. Ed. 2d 523 (2017)*. However, "an ADA plaintiff cannot simply ignore the apparent contradiction that arises out of [a] . . . total disability claim . . . [but] must proffer a sufficient explanation." *Id.* (quoting Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 806, 119 S. Ct. 1597, 143 L. Ed. 2d 966 (1999)). To survive summary judgment in such a case, Hargett was required to explain how she could still perform the essential functions of her position with a reasonable accommodation when the disability determination allegedly failed to take this factor into account. *See id.* In her response to JCBE's motion for summary judgment, Hargett failed to explain this discrepancy. We will not consider her proposed explanation for the discrepancy between her request to return to work and the disability determination for the first time on appeal. *See* Am. Trim, L.L.C. v. Oracle Corp., 383 F.3d 462, 477 (6th Cir. 2004).

For the reasons discussed above, Hargett failed to "set forth specific facts showing that there is a genuine issue for trial" regarding the evidence showing **[*11]** that she was not "otherwise qualified" to perform her duties after she was declared disabled on July 1, 2014. *See* Anderson, 477 U.S. at 248. Without this required element, Hargett failed to establish a prima facie case of discrimination based on events that occurred on that date and thereafter, and the district court properly granted summary judgment on this claim.

B. Failure to Accommodate Before July 1, 2014

Hargett argued that the JCBE refused to offer a reasonable accommodation for her to return to her third-grade teaching position at Audubon after her medical leave. HN9[] A "reasonable accommodation" may include:

> making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and job restructuring, . . . reassignment to a vacant position, acquisition or modifications of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies . . . or other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(9)(A)-(B).

HN10[] "To determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the [employee]." *29 C.F.R. § 1630.2(o)(3)*. "This process should identify the precise limitations resulting **[*12]** from the disability and potential reasonable accommodations that could overcome those limitations." *Id.* This "interactive process is mandatory, and both parties have a duty to participate in good faith." Kleiber, 485 F.3d at 871. "An employer has sufficiently acted in

good faith when it readily meets with the employee, discusses any reasonable accommodations, and suggests other possible positions for the plaintiff." *Jakubowski v. Christ Hosp., Inc., 627 F.3d 195, 203 (6th Cir. 2010)*. "The disabled employee bears the burden of proposing an accommodation and showing that it is objectively reasonable," but "[w]here there is more than one reasonable accommodation, the choice of accommodation is the employer's." *Smith v. Honda of Am. Mfg., 101 F. App'x 20, 25 (6th Cir. 2004)*. "An employee who declines an offered reasonable accommodation forfeits the status as a 'qualified individual with a disability.'" *Id.* (quoting *Hankins v. The Gap, Inc., 84 F.3d 797, 801 (6th Cir. 1996)*).

Rather than providing Hargett with teaching assistants or parent volunteers, as she had proposed, the JCBE administrators offered her a wheelchair to use when she was required to keep up with her students and move to another location within the school. JCBE offered her a position teaching first grade at Audubon as well. JCBE declined Hargett's request for a teaching assistant to be on call during her class moves because it was unreasonable **[*13]** to expect either a teaching assistant or a parent to be readily available on an "as-needed" basis, and it would have been an undue hardship for JCBE to hire an assistant to carry out this duty, even on a part-time basis. *Cf. Belasco v. Warrensville Heights City Sch. Dist., 634 F. App'x 507, 516 (6th Cir. 2015)* (***HN11***[↑] "[T]he ADA does not require employers to hire a second person to fulfill the job responsibilities ordinarily performed by one person."); *see also Johnson, 443 F. App'x at 986*. JCBE's alternative offer of a first-grade teaching position also reflected its willingness to engage in an interactive process and offer her different options, which could include "reassignment to a vacant position." *See 42 U.S.C. § 12111(9)(B)*. Moreover, Hargett retreated from engaging in an interactive process after JCBE offered her a wheelchair; she flatly rejected the proposal and continued to insist on her suggested accommodation. Therefore, Hargett forfeited her status as a qualified individual within the meaning of *§ 12112(a)* when she rejected JCBE's alternative offers. *See Smith, 101 F. App'x at 25*. As a result, the district court properly granted summary judgment on this discrimination claim for failure to accommodate her disability to return to her third-grade teaching position at Audubon.

Hargett also forfeited her status as a "qualified individual with a disability" **[*14]** when she refused to accept JCBE's accommodations with respect to monitoring the halls at Kammerer. Rather than proposing any alternative reasonable accommodation and engaging in an interactive process regarding this essential function of her job, Hargett responded with a note from her doctor that she should avoid this duty altogether. However, Hargett fails to recognize that her doctor subsequently authorized her to perform this duty with the accommodations that had been offered. Hargett failed to rebut JCBE's evidence that she never proposed a reasonable accommodation for monitoring the halls in the morning, and that she rejected JCBE's choice of a reasonable accommodation for this duty. *See id.*

On appeal, Hargett argues that the hall duty was not an essential function of her job and that the district court thus erroneously determined that she could not perform all of the essential functions of teaching at Kammerer with or without accommodation. ***HN12***[↑] Hargett failed to raise this argument in the district court, and we will not consider it for the first time on appeal. *Am. Trim, 383 F.3d at 477*.

Even if we considered this argument, Hargett would still not meet her burden of rebutting JCBE's evidence that hall monitoring **[*15]** was an essential function of her job at Kammerer. ***HN13***[↑] Under the ADA regulations, several factors may be considered in determining whether a job function is essential, including the employer's judgment as to which functions are essential; the consequences of not requiring the incumbent to perform the function; the work experience of past incumbents in the job; and the current work experience of incumbents in similar jobs. *29 C.F.R. § 1630.2(n)*; *see also Green v. BakeMark USA, LLC, 683 F. App'x 486, 492 (6th Cir. 2017)*. All of these factors weigh in JCBE's favor, as evidenced by Smith's affidavit, Hargett's initial acceptance of this duty when she first began teaching at Kammerer, and the undisputed fact that other teachers at Kammerer were assigned this duty. Therefore, it would have been unreasonable for Hargett to request that this essential function be removed from her job duties. *Cf. EEOC v. Ford Motor Co., 782 F.3d 753, 761 (6th Cir. 2015)*. The district court properly granted summary judgment on Hargett's claim of discrimination for allegedly failing to offer a reasonable accommodation for her hall-monitoring duties at Kammerer.

C. Constructive Discharge

Hargett next argues that her transfer to Kammerer was an adverse employment action that eventually led to her constructive discharge. ***HN14***[↑] To prevail on a claim

for discriminatory **[*16]** discharge under the ADA, Hargett was required to show that: (1) she was disabled; (2) she was otherwise qualified to perform the essential functions of her position, with or without reasonable accommodation; (3) she suffered an adverse employment action; (4) JCBE knew or had reason to know of her disability; and (5) the position remained open or a nondisabled person replaced her. *See* Green, 683 F. App'x at 495. "In this circuit, constructive discharge qualifies as an adverse employment action under the ADA." *Id.* (citing Talley v. Family Dollar Stores of Ohio, Inc., 542 F.3d 1099, 1107 (6th Cir. 2008)). To show a constructive discharge, Hargett was required to show that "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." Talley, 542 F.3d at 1107. In the failure-to-accommodate context, "'a complete failure to accommodate, in the face of repeated requests, might suffice as evidence to show the deliberations necessary for constructive discharge.'" Id. at 1109 (quoting Johnson v. Shalala, 991 F.2d 126, 132 (4th Cir. 1993)).

Here, Hargett's transfer to Kammerer was ordered immediately after she informed JCBE that she was available for placement at another school and that she would teach in any class above the third grade. Having been assigned to the eighth-grade teaching job at Kammerer, **[*17]** Hargett can hardly complain, in hindsight, that JCBE made this transfer with the intention of discriminating against her based on her disability and with the intent of forcing her to resign when that position met her own criteria. In addition, JCBE presented evidence showing that it offered more than one accommodation during her morning hall duty, so there is an absence of evidence showing that JCBE "completely failed" to offer her any accommodation. *See* id. at 1107.

Further, there was an absence of evidence to establish any of the factors that we consider significant in determining whether a reasonable person would have felt compelled to resign, such as a reduction in salary, badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation. *See* Savage v. Gee, 665 F.3d 732, 739 (6th Cir. 2012). In light of this evidence, Hargett cannot show that JCBE "'deliberately create[d] intolerable working conditions . . . with the intention of forcing' [Hargett] to quit." *See* Green, 683 F. App'x at 496 (quoting Moore v. KUKA Welding Sys. & Robot Corp., 171 F.3d 1073, 1080 (6th Cir. 1999)). As a result, Hargett failed to satisfy the third prong of an ADA discriminatory discharge claim—that she was the subject of an adverse employment action. *See* id. at 495. Thus the district court properly granted summary judgment in favor of the defendant **[*18]** on this claim.

II. *FMLA* Interference and Retaliation Claims

Hargett claims that JCBE interfered with her rights to request and receive *FMLA* leave when it denied her request to return to her third-grade teaching position after receiving Dr. Catalano's October 7 "release." She also claims that her transfer to Kammerer was in retaliation for her requesting *FMLA* leave. Hargett admits that at no time did the defendant deny her requests for *FMLA* leave for her medical conditions, question her need for this leave, react negatively in any way to her *FMLA* requests, or imply that she was denied her original teaching position at Audubon because of her leave requests.

HN15[↑] "The *FMLA* entitles an eligible employee to as many as twelve weeks of [unpaid] leave during any twelve-month period if the employee has a 'serious health condition that makes the employee unable to perform the functions of the position of such employee.'" Chandler v. Specialty Tires of Am. (Tn.), Inc., 283 F.3d 818, 825 (6th Cir. 2002). "There are two theories of *FMLA* liability against employers: the interference theory and the retaliation theory." Huffman v. Speedway, LLC, 621 F. App'x 792, 796 (6th Cir. 2015). "The interference theory arises from 29 U.S.C. § 2615(a)(1), which states that '[i]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to **[*19]** exercise, any right provided in this subchapter.'" *Id.* "The retaliation theory arises from § 2615(a)(2), which provides that '[i]t shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.'" *Id.*

HN16[↑] To prevail on an *FMLA* interference claim, a plaintiff must show that "(1) [she] was an eligible employee; (2) the defendant was an employer as defined under the *FMLA*; (3) the employee was entitled to leave under the *FMLA*; (4) the employee gave the employer notice of [her] intention to take leave; and (5) the employer denied the employee *FMLA* benefits to which she was entitled." Walton v. Ford Motor Co., 424 F.3d 481, 485 (6th Cir. 2005). Interference also encompasses actions by an employer that discourage an employee from using *FMLA* leave. *See* Arban v. W. Publ'g Corp., 345 F.3d 390, 402 (6th Cir. 2003) (citing

29 C.F.R. § 825.220(b)). HN17[] To establish a prima facie case of FMLA retaliation, Hargett was required to show that (1) she engaged in an activity protected by the FMLA, (2) the exercise of her right was known to JCBE, (3) JCBE thereafter took an employment action adverse to Hargett, and (4) there was a causal connection between the protected activity and the adverse employment action. *See* id. at 404.

HN18[] Under the interference theory, "[b]ecause the issue is **[*20]** the right to an entitlement, the employee is due the benefit if the statutory requirements are satisfied, regardless of the intent of the employer." Jaszczyszyn v. Advantage Health Physician Network, 504 F. App'x 440, 447 (6th Cir. 2012) (quoting Edgar v. JAC Prods., Inc., 443 F.3d 501, 507 (6th Cir. 2006)). In contrast, "the employer's motive is an integral part of the analysis" for retaliation claims because they "impose liability on employers that act against employees specifically because those employees invoked their FMLA rights." *Id.* (quoting Edgar, 443 F.3d at 508).

Hargett's claims fail for several reasons. First, HN19[] under the FMLA, an employer's obligation is limited to twelve weeks of FMLA leave during any twelve-month period for a serious health condition. *See* 29 U.S.C. § 2612(a)(1)(D); *see also* Chandler, 283 F.3d at 825. The October 7 note by Dr. Catalano, upon which Hargett relies, indicated that she was not able to return to work until January 2014, which placed her anticipated leave beyond the protected period under either the FMLA or the applicable bargaining agreement. In addition, this note was specifically superseded by Dr. Catalano's November note stating that she could return to work earlier but with restrictions. Nevertheless, relying on the information that Hargett provided in October, JCBE did not violate Hargett's rights under the FMLA by replacing her when, under the FMLA, Hargett **[*21]** would not have been an eligible employee after the twelve weeks had expired.

In addition, JCBE placed Hargett in an "equivalent position" at Kammerer, with "equivalent employment benefits, pay, and other terms and conditions of employment." *See* 29 U.S.C. § 2614(a)(1)(B). Moreover, Hargett admitted that she had never been denied any requested FMLA leave, either before or after her request for an extension, that no one had ever suggested to her that she had taken FMLA leave inappropriately, and that no one had ever commented negatively about her FMLA leave requests.

Further, HN20[] "interference with an employee's FMLA rights does not constitute a violation if the employer has a legitimate reason unrelated to the exercise of FMLA rights for engaging in the challenged conduct." Grace v. USCAR, 521 F.3d 655, 670 (6th Cir. 2008) (quoting Edgar, 443 F.3d at 508). After JCBE was made aware that Hargett could return to work in November with restrictions, it responded by accommodating her with a position where teaching older students would have been less of a hindrance. JCBE offered a "legitimate reason unrelated to the exercise of FMLA rights for engaging in the challenged conduct" of transferring her to Kammerer. *See* Jaszczyszyn, 504 F. App'x at 447.

HN21[] Because JCBE presented a legitimate, non-discriminatory reason to justify **[*22]** Hargett's re-assignment, she was required to rebut it by a preponderance of the evidence showing that the proferred reason "(1) ha[d] no basis in fact, (2) did not actually motivate the defendant's challenged conduct, or (3) was insufficient to warrant the challenged conduct." *See* Dews v. A.B. Dick Co., 231 F.3d 1016, 1021 (6th Cir. 2000); *see also* Arban, 345 F.3d at 401. Hargett's sole argument on appeal is that "JCBE's refusal to accept her release with restrictions until after it replaced her at Audubon Elementary would permit a jury to find that JCBE's decision was not based in fact." However, she fails to recognize that, at the time she was replaced at Audubon, JCBE had not yet been informed about her ability to continue working with restrictions. Moreover, JCBE accepted her "release with restrictions" when they re-assigned her a job at Kammerer in the type of position that she requested. Thus, Hargett has failed to rebut JCBE's legitimate reason for her transfer in January 2014.

Accordingly, we **AFFIRM** the district court's order.

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