COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-91

NANCY CHADWICK

vs.

DUXBURY PUBLIC SCHOOLS & others.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, Nancy Chadwick, brought this action in the Superior Court against defendants Duxbury Public Schools (Duxbury), Karen Baynes, Andrew Stephens, and Marc Talbot. Chadwick's complaint alleges (1) employment discrimination on the basis of disability in violation of G. L. c. 151B, § 4 (16), against all defendants, (2) failure to provide reasonable accommodations against Duxbury, and (3) retaliation against all defendants. After discovery,[2] the Superior Court judge granted

[1] Karen Baynes, Andrew Stephens, and Mark Talbot.

[2] During discovery, a dispute arose regarding the defendants' efforts to compel disclosure of communications between Chadwick and her union. A Superior Court judge declined to recognize a union member-union privilege, and denied Chadwick's motion for a protective order. The Supreme Judicial Court (SJC) transferred on its own motion Chadwick's interlocutory appeal of the denial of her motion for a protective order, and affirmed the judge's ruling. See Chadwick v. Duxbury Pub. Sch., 475 Mass. 645, 656 (2016).

the defendants' motion for summary judgment, from which Chadwick now appeals. We affirm the entry of summary judgment for the defendants.

Background. Chadwick began working as an English teacher at Duxbury High School (DHS) in 2006. In 1998, Chadwick was diagnosed with and sought treatment for posttraumatic stress disorder (PTSD).[3]

In 2009, defendant Baynes was appointed subject supervisor for the English department, a position that Chadwick had also sought. Chadwick asserts that, prior to disclosing her PTSD diagnosis to the defendants, Baynes had exhibited hostility towards her, including at one point attempting to persuade Stephens not to grant Chadwick professional teacher status.

Chadwick first informed Duxbury of her PTSD diagnosis by letter dated September 28, 2012. This letter, sent by Chadwick's attorney to Benedict Tantillo, Duxbury's superintendent, stated, in relevant part, as follows:

> "The purpose of this letter is: a) to inform you that Ms. Chadwick is a handicapped person, as defined by G. L. c. 151B, § 4.16; and b) to request reasonable accommodation for that condition.
>
> a) Ms. Chadwick suffers from post-traumatic stress disorder. This condition is exacerbated by differential

[3] According to Chadwick, loud screaming and confrontations trigger her PTSD, which typically manifests itself in the form of symptoms that include hyper-vigilance, shortness of breath, racing heartbeat, and anxiety.

> and harassing treatment, particularly arbitrary and harassing conduct by persons given authority over her work.
>
> b) With respect to the accommodation requested, I know that you are well aware of the treatment that Ms. Chadwick has experienced at the hands of Karen Baynes, also an employee of the Public Schools, over the past several years. Although not the cause of Ms. Chadwick's condition, such behavior exacerbates it. On my client's behalf, I request that your department take all reasonable steps to minimize the contact -- and opportunity for conflict -- between the two employees. In particular, I request that someone other than Ms. Baynes be assigned to evaluate Ms. Chadwick's performance. The requested accommodation is reasonable, because Ms. Chadwick has been evaluated by other individuals for a number of years, particularly including the past two. Therefore, assigning someone other than Ms. Baynes to evaluate Ms. Chadwick would not impose an undue burden on the Public Schools. Indeed, it would impose no burden at all."

Duxbury granted the request and assigned Talbot, DHS's assistant principal, as Chadwick's evaluator. Baynes, of course, remained the subject supervisor for the English department, and had continued responsibilities for coordinating curriculum issues.

In the spring of 2014, about a year and one-half after the request for accommodation, two parents contacted Baynes in her capacity as subject supervisor to raise multiple concerns they had with Chadwick's teaching practices. After meeting with the two parents individually, Baynes sent an e-mail to Chadwick detailing the concerns raised by the two parents and requesting a meeting "to discuss and hopefully to resolve these issues." Chadwick sent a detailed response, stating that Baynes's e-mail

to her "made [her] feel more than uncomfortable and anxious," and that her "health is negatively affected."

On April 4, 2014, Chadwick met with Baynes, Talbot, and her union representative in Talbot's office. The meeting lasted over two hours, during which both Baynes and Talbot questioned Chadwick. Chadwick suffered a PTSD episode during this meeting, and felt that Baynes and Talbot were "coming after" her. She did not tell anyone and participated in the meeting.

Chadwick attended another meeting on May 12, 2014, this time with Baynes, Talbot, and Stephens, DHS's principal.[4] At this meeting, Stephens handed Chadwick a list of twenty-two "directives" she was expected to effectuate in order to address her performance concerns and complete her curriculum within the time remaining in the school year. Chadwick complied with all of the "directives" listed in the memorandum. However, at the conclusion of the 2013-2014 school year, Talbot issued a "formative evaluation" of Chadwick that gave her an "Overall Performance" rating of "Needs Improvement."

[4] Tantillo instructed Chadwick to attend the May 12, 2014 meeting after she refused previous attempts to schedule one due to her PTSD symptoms.

In June 2014, Chadwick filed a complaint[5] at the Massachusetts Commission Against Discrimination (MCAD).[6] In a letter addressed to Tantillo dated August 15, 2014, Chadwick once again requested a new evaluator. As grounds for this request, Chadwick stated: "Given the proceedings at the MCAD, in which Marc Talbot is involved, I think it might be inappropriate for him to continue as my evaluator." Tantillo denied this request.

Due to the "Needs Improvement" rating, Chadwick was placed on a "directed growth plan"[7] (Plan) for the 2014-2015 school year. Among other tasks, the Plan required Chadwick to attend biweekly meetings with Talbot, her primary evaluator. These meetings took place in Stephens's office with Stephens present. Chadwick alleged that during these meetings, "both Talbot and Stephens intruded repeatedly on her personal space" and treated her differently than they did other teachers, though the record does not reflect that she told them this. In the meantime, Talbot continued to observe Chadwick's class and provide

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[5] The complaint Chadwick filed with the Massachusetts Commission Against Discrimination is not in the record before us.

[6] Chadwick concedes that no Duxbury administrator ever spoke to her or confronted her about the MCAD complaint, and that she is unaware of any statements made by anyone indicating that her performance reviews were based on her filing of the MCAD complaint.

[7] A "directed growth plan" is "a disciplinary action that permitted Duxbury public schools to dismiss [Chadwick] at the end of the 2014-2015 school year." Chadwick, 475 Mass. at 648.

feedback, including some criticisms. Talbot also authored a "Formative Assessment Report" dated January 23, 2015, in which Talbot further detailed the areas in which Chadwick needed improvement, and noted that Chadwick was in jeopardy of not meeting the Plan's requirements.

On March 27, 2015, Chadwick sent to Tantillo an e-mail indicating that she would take medical leave for the remainder of the 2014-2015 school year. On May 8, 2015, Talbot issued a "Summative Evaluation Report" concluding that Chadwick had not met the Plan's requirements, and, significantly, had not been on pace to do so when she took the medical leave.

In a letter dated August 10, 2015, Chadwick informed Tantillo that she would retire on August 31, 2015.

Discussion. We review the grant or denial of summary judgment de novo, and "we consider the record and the legal principles involved without deference to the motion judge's reasoning." Zielinski v. Connecticut Valley Sanitary Waste Disposal, Inc., 70 Mass. App. Ct. 326, 334 (2007). Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002). "[A] party . . . is entitled to summary judgment if he demonstrates . . . that the party opposing the motion has no reasonable expectation of proving an

essential element of that party's case." Kourouvacilis v. General Motors Co., 410 Mass. 706, 716 (1991). In adjudicating motions for summary judgment, a court "make[s] all permissible inferences favorable to the nonmoving party . . . and resolve[s] any disputes or conflicts in the summary judgment materials in their favor."[8] Carey v. New England Organ Bank, 446 Mass. 270, 273 (2006).

1. Disability discrimination. In adjudicating violations of G. L. c. 151B, § 4 (16), Massachusetts courts "follow the three-stage order of proof set forth by the United States Supreme Court under the Federal antidiscrimination provisions of Title VII."[9] Blare v. Husky Injection Molding Sys. Boston, Inc., 419 Mass. 437, 440 (1995). To meet his or her burden at the

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[8] We discern no merit to Chadwick's argument that the standards applicable to a motion for judgment notwithstanding the verdict under rule 50 apply here. The defendant filed a motion for summary judgment pursuant to Mass. R. Civ. P. 56, and the Superior Court judge reviewed and decided the case under the rule 56 standards. The rule 56 summary judgment standards control. See Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002).

[9] "In the first stage, the plaintiff has the burden to show by a preponderance of the evidence a prima facie case of discrimination." Blare v. Husky Injection Molding Sys. Boston, Inc., 419 Mass. 437, 441 (1995). "In the second stage, the employer can rebut the presumption created by the prima facie case by articulating a legitimate, nondiscriminatory reason for its hiring decision." Id. Once the employer has come forth with a nondiscriminatory reason for its action, the burden shifts back to the employee to offer "evidence sufficient to support a determination either that the employer's reason was a pretext or that the actual reason for the adverse hiring decision was discrimination." Id. at 445.

first stage of the analysis, the employee needs to "show that he is 'handicapped' within the meaning of the statute; that he is a 'qualified handicapped person' capable of performing the essential functions of his job either without accommodation or with a reasonable accommodation; and that he was subject to an adverse employment action because of his handicap." Godfrey v. Globe Newspaper Co., 457 Mass. 113, 120 (2010).

Chadwick contends that there is sufficient evidence in the record that would allow a jury to conclude that she had suffered an adverse employment action. We disagree.[10] To show that she has suffered an "adverse employment action," a plaintiff must adduce "objective evidence that he [or she] had been disadvantaged in respect to salary, grade, or other objective terms and conditions of employment." MacCormack v. Boston Edison Co., 423 Mass. 652, 663 (1996).

The record is devoid of evidence that Chadwick suffered any denial or deprivation of any benefit or other objective term of employment. Chadwick did not suffer any demotion or loss of pay, did not lose any job title, did not experience any change in responsibilities, and was never denied any benefit such as leave or vacation time. See Trinh v. Gentle Communications,

[10] Because we conclude that Chadwick has no reasonable expectation of meeting her burden to prove a prime facie case of discrimination, we need not address the second and third stages of the burden-shifting framework.

LLC, 71 Mass. App. Ct. 368, 374-375 (2008) (no adverse action where plaintiff's "pay had not been reduced" and her responsibilities remained "substantially the same"). The defendants' criticisms of her teaching and their general treatment of her, while perhaps unpleasant for her, did not affect the "objective terms and conditions of [her] employment."[11] MacCormack, 423 Mass. at 663. See King v. Boston, 71 Mass. App. Ct. 460, 469 (2008) ("the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action" [citation omitted]).

[11] Chadwick's reliance on Yee v. Massachusetts State Police, 481 Mass. 290 (2019), is misplaced. The issue in Yee was whether the failure to grant a lateral transfer from one police troop to another could constitute an adverse employment action when the base salary and benefits would have been the same, but where the second troop "offered more opportunities for overtime and paid details." Id. at 297. In so doing, the SJC re-emphasized that "an action taken by an employer is an 'adverse employment action' where it is 'substantial enough to have materially disadvantaged an employee,'" id. at 296, quoting Psy-Ed Corp. v. Klein, 459 Mass. 697, 707-708 (2011), which "arises when objective aspects of the work environment are affected," Yee, supra at 297, quoting King v. Boston, 71 Mass. App. Ct. 460, 468 (2008). Under this standard, the SJC concluded that "[t]he failure to grant a lateral transfer is certainly an 'employment action' by an employer where an employee with supervisory authority . . . decides not to transfer the employee seeking the transfer to that position." Yee, supra. Here, by contrast, Chadwick has suffered no such adverse employment action. She has not been denied a requested transfer, nor has any other objective aspect of her employment been affected.

To overcome this obstacle, Chadwick offers two theories to satisfy the adverse action requirement. Neither can prevail. First, Chadwick contends that the defendants subjected her to a hostile work environment.[12] To prevail on a hostile work environment claim, the plaintiff must show "(1) she was disabled . . . , (2) she was subjected to uninvited harassment, (3) her employer's conduct was based on her disability, (4) the conduct was so severe or pervasive that it altered the conditions of her work and created an abusive work environment, and (5) the harassment was objectively and subjectively offensive."[13] McDonough v. Donahoe, 673 F.3d 41, 46 (1st Cir. 2012).

Chadwick cannot prevail on this ground because she has no reasonable expectation of showing that the defendants' actions were "based on her disability," or were otherwise motivated by a discriminatory animus towards her disability.[14] McDonough, 673

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[12] Whether a hostile work environment claim based on disability is available in this Commonwealth is unclear. See Barton v. Clancy, 632 F.3d 9, 20 n.7 (1st Cir. 2011) ("The SJC has not specifically confirmed that Massachusetts recognizes a claim for a hostile work environment based on handicap under c. 151B, § 4[16]"). For the purposes of the present appeal, we assume, without deciding, that such a claim is a viable basis for recovery under G. L. c. 151B, § 4.

[13] As no Massachusetts decision sets forth the elements of a hostile work environment claim based on disability, we look to Federal cases for guidance. See Labonte v. Hutchins & Wheeler, 424 Mass. 813, 823 n.13 (1997).

[14] Chadwick's own allegations suggest that the defendants' actions were motivated by factors entirely unrelated to her disability. Chadwick makes passing references, both in the Superior Court and on appeal, to the fact she was elected

F.3d at 46. Her bare assertion that the jury could have found a causal connection between her disability and the defendants' actions is insufficient to survive summary judgment.[15] See Polaroid Corp. v. Rollins Envtl. Servs. (NJ), Inc., 416 Mass. 684, 696 (1993) ("bare assertions and conclusions regarding a [party]'s understandings, beliefs, and assumptions are not enough to withstand a well-pleaded motion for summary judgment").

Chadwick also contends that she was constructively discharged when she retired in the summer of 2015. "A '[c]onstructive discharge occurs when the employer's conduct effectively forces an employee to resign'" (citation omitted). GTE Prods. Corp. v. Stewart, 421 Mass. 22, 33-34 (1995). "The test is met if, based on an objective assessment of the

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president of her union, and her access to e-mail and Internet were cut off on several occasions while she was union president. She also alleged that "[e]ven before the events at issue here, Baynes exhibited hostility toward" her, including attempting to convince Stephens to deny her professional teacher status. These allegations further undermine any causal link between Chadwick's PTSD diagnosis and the defendants' alleged mistreatment of her.

[15] While it is true that "[w]hen intent is at the core of a controversy, summary judgment seldom lies," Chadwick must still adduce specific facts sufficient to create a genuine dispute of material fact as to the defendants' intent in order to avoid summary judgment. Madden v. Estin, 28 Mass. App. Ct. 392, 395 (1990). See, e.g., Sullivan v. Liberty Mut. Ins. Co., 444 Mass. 34, 57 (2005) ("[Plaintiff]'s proof is insufficient, as a matter of law, to show that, when she was terminated, [the defendant] had a discriminatory intent, motive, or state of mind . . ."). She has not done so here.

conditions under which the employee has asserted he was expected to work, it could be found they were so difficult as to be intolerable." Id. at 34. Moreover, "mere dissatisfaction with the nature of assignments, criticism of an employee's performance, and dissatisfaction with compensation have been held insufficient to establish a triable question of fact on the issue of constructive discharge." Id. at 35.

This argument is also unavailing. Even when viewed in the light most favorable to Chadwick, the infrequent communications, meetings, and periodic reviews of Chadwick's performance are insufficient to create a genuine dispute of material fact. Cf. GTE Prods. Corp., 421 Mass. at 35 (no constructive discharge where employee "was not faced with a demotion, or a loss of job responsibilities or compensation"). Chadwick's constructive discharge argument, therefore, also cannot save her discrimination claim from summary judgment.[16]

[16] Further undermining her constructive discharge claim is the fact that Chadwick went on leave in March of 2015 and did not serve notice of her retirement until five months later, in August. See Trinh, 71 Mass. App. Ct. at 374-375 (no constructive discharge where plaintiff had been transferred out of office "where the complained-of harassment took place, and away from the one manager who had harassed her"). During the intervening period, Chadwick signed a contract to return for the following school year, and concededly "had every intention" of returning. Given these undisputed facts, Chadwick has no reasonable expectation of proving that circumstances were such that she was essentially forced to resign or retire.

2. Retaliation. To establish a prima facie case of retaliation, Chadwick "had to show that [s]he engaged in protected conduct, that [s]he suffered some adverse action, and that 'a causal connection existed between the protected conduct and the adverse action'" (footnotes and citation omitted). Mole v. University of Mass., 442 Mass. 582, 591-592 (2004).

This claim fails for much the same reasons as Chadwick's discrimination claim. First, for reasons already discussed, Chadwick has no reasonable expectation of showing that she suffered an adverse action in retaliation for the filing of her MCAD complaint. Mere displays of perceived hostility do not constitute adverse actions in the context of retaliation. See Bain v. Springfield, 424 Mass. 758, 765-766 (1997).

Even if she were able to show that she suffered an adverse action, Chadwick has no reasonable expectation of showing that "a causal connection existed between the [filing of her MCAD complaint] and the adverse action" (citation omitted). Mole, 442 Mass. at 592. In the retaliation context, "the employer's desire to retaliate against the employee must be shown to be a determinative factor in its decision to take adverse action." Psy-Ed Corp. v. Klein, 459 Mass. 697, 707 (2011).

Viewing the record in the light most favorable to Chadwick, we discern no objective evidence that would allow a jury to conclude that the desire to retaliate was a "determinative

factor" that drove the defendants' actions. Psy-Ed Corp., 459 Mass. at 707. Chadwick admits that no Duxbury administrator ever spoke to her or confronted her about her filing a MCAD complaint. Moreover, Chadwick does not identify any nexus between her negative performance reviews and her disability, apart from her subjective statements to the effect that Stephens and Talbot "were both out to get [her]," and that during the April 4, 2014, meeting she "felt attacked" and that "they were coming after [her]." See MacCormack, 423 Mass. at 663 ("objective evidence that [one has] been disadvantaged in respect to salary, grade, or other objective terms and conditions of employment" necessary to prove retaliation claim; "subjective feelings of disappointment and disillusionment" do not suffice). Finally, some of the actions Chadwick complains of predate the filing of her MCAD complaint in June 2014, which further undermines any causal link.[17] See Mole, 442 Mass. at 594 ("Where . . . adverse employment actions or other problems with an employee predate any knowledge that the employee has engaged in protected activity, it is not permissible to draw the inference that subsequent adverse actions, taken after the employer acquires such knowledge, are motivated by

[17] Chadwick's allegation that Baynes harbored long-standing animus towards her also undermines any causal connection between any adverse action and Chadwick's PTSD diagnosis or her MCAD complaint. See note 15, supra.

retaliation"). In short, summary judgment properly entered as to the retaliation claim.

3. Reasonable accommodation. To prove a reasonable accommodation claim, Chadwick "must show that [she] was a 'qualified handicapped person' capable of performing the essential functions of h[er] job with reasonable accommodation; [she] requested such accommodation, and [Duxbury] refused to provide it; and, as a result of this refusal, [s]he suffered some harm." Alba v. Raytheon Co., 441 Mass. 836, 843 n.9 (2004).

Chadwick contends that "the fact-finder could determine that the defendants' choice to involve Baynes so closely in the events in the spring of 2014 constituted a denial of reasonable accommodation." The claim is unavailing for several reasons.

First, Chadwick sought to have "someone other than Ms. Baynes be assigned to evaluate [her] performance."[18] There is no dispute that Duxbury granted the requested accommodation, and that for one and one-half years after Chadwick requested the accommodation, there was no contact between Chadwick and Baynes. Indeed, asked at her deposition if there were any other

[18] The September 28, 2012, letter also stated, in part, that Chadwick wanted to "minimize the contact" between Chadwick and Baynes, and explained that "minimize" meant that someone other than Ms. Baynes be assigned to evaluate Ms. Chadwick's performance."

accommodations that she sought (apart from her request for an evaluator other than Baynes) that Duxbury did not provide, she replied, "Not that I recall." See Godfrey, 457 Mass. at 122-123 ("no question of material fact in dispute concerning the plaintiff's initial request for accommodation because the plaintiff received essentially the accommodation that he sought").

It is further undisputed that to the extent that Chadwick continued to have issues, she did not notify the school of them, but instead kept them to herself. See generally Russell v. Cooley Dickinson Hosp., Inc., 437 Mass. 443, 457 (2002), quoting Taylor v. Principal Fin. Group, Inc., 93 F.3d 155, 165 (5th Cir.), cert. denied, 519 U.S. 1029 (1996) ("[I]t is the employee's initial request for an accommodation which triggers the employer's obligation to participate in the interactive process of determining one").

Finally, even assuming, arguendo, that the September 28, 2012 letter sought the further specific accommodation to "minimize contact" with Baynes, Chadwick has no reasonable expectation of proving that Duxbury failed to do so. The record is devoid of evidence of any contact between Chadwick and Baynes for the one and one-half years between September 2012 (the date of the letter from Chadwick's attorney) and the spring of 2014. Thus, not only did Duxbury "minimize . . . contact" between

Chadwick and Baynes, it eliminated it for eighteen months. The interactions between Baynes and Chadwick that occurred after the September 28, 2012 request were not only minimal,[19] but were also directly related to Baynes's responsibilities, as subject supervisor, to address curriculum-related issues. If replacing her evaluator was insufficient to accommodate her condition, Chadwick should have requested further accommodation from Duxbury. See Russell, 437 Mass. at 457-458 (holding that failure to request accommodation in form of assignment to reserve position, after employer had accommodated plaintiff in other ways, was "fatal to [plaintiff's] claim").[20] Likewise, if

[19] As far as the record before us discloses, Baynes only interacted with Chadwick on three instances after Duxbury received the September 28, 2012 letter. First, Baynes, in her capacity as subject supervisor, sent Chadwick an e-mail on March 30, 2014, detailing concerns raised by two parents, after they no longer felt comfortable talking to Chadwick. Second, on April 4, 2014, Chadwick attended a meeting with Baynes, Talbot, and her union representative during which she was questioned by both Baynes and Talbot. Finally, Chadwick was instructed to attend another meeting on May 12, 2014, with Talbot and Stephens, which Baynes also attended.

[20] We recognize that "[o]nce the employer knows of the disability and the employee's desire for accommodations, it makes sense to place the burden on the employer to request additional information that the employer believes it needs." Taylor v. Phoenixville School Dist., 184 F.3d 296, 315 (3d Cir. 1999). In the present case, however, Duxbury responded to Chadwick's request in 2012, changed her evaluator as requested, and minimized contact with Baynes. Contrast id. at 319 (genuine dispute of fact existed regarding school district's good faith participation in interactive process where "after becoming disabled and seeking accommodations, she has presented evidence that the school district made no response to her request and instead increased the difficulty of her job"). Although

Chadwick desired to forever eliminate any contact with Baynes to accommodate her condition, she needed to make such a request.[21] See id. (no error granting defendants' motion for summary judgment on plaintiff's claim of employment discrimination on basis of disability where, inter alia, accommodations plaintiff asserts should have been provided were "never requested or even suggested by the plaintiff"). Having failed to do so, summary judgment properly entered as to the reasonable accommodation claim.[22]

Conclusion. Because Chadwick has not established a genuine dispute of material fact as to any claim in her complaint, we

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Chadwick proffered evidence that her disability was later triggered, the record is clear that she did not communicate that fact to Duxbury.

[21] Nothing herein should be construed to suggest that an employer must allow an employee to select his or her own supervisor.

[22] Chadwick also argues in passing that her request for a new evaluator to replace Talbot in August 2014 constituted another improperly-denied request for reasonable accommodation. We disagree. By its terms, the August 15, 2014 letter cites "the proceedings at the MCAD" as the basis for the request. Because this request lacks a direct nexus to Chadwick's PTSD diagnosis, it cannot support a reasonable accommodation claim.

affirm the entry of summary judgment for the defendants.

Judgment affirmed.

By the Court (Neyman, Henry & Singh, JJ.[23]),

Clerk

Entered: March 17, 2020.

[23] The panelists are listed in order of seniority.