UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, and AHMET DEMERELLI, Plaintiff-Intervenor v. CONVERGYS CUSTOMER MANAGEMENT GROUP INC., Defendant.	)	No. 4:04CV00846CAS

DEFENDANT'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendant Convergys' time records show Plaintiff Demirelli was tardy 102 times during the year before he was terminated. Demirelli testified he knew it was important for him to be on time and he knew every time he clocked in late to work or returning from a meal break. His computer screen always displayed the time he logged in. Understandably, Demirelli testified that the summary of Convergys' time records, Ex. 36, appeared to accurately reflect his tardiness. Still, Plaintiff EEOC tries to create a disputed fact by saying that Demirelli never saw Ex. 36 before his deposition.

It doesn't matter.[1] The following facts are not disputed and are dispositive of this motion.

[1] EEOC's challenge to Ex. 36 does not dispute the 65 tardies Demirelli accumulated by failing to return from his meal break on time. (See Convergys Facts ¶ 48, 49, 76 and Convergys' Reply thereto).

On April 18, 2002, Demirelli was on final written warning for violation of every attendance policy that Convergys then had, i.e. eight absences, one "no call, no show", and eighteen tardies. (Convergys Facts ¶ 39-43) Demirelli understood Convergys' attendance policy and that an additional violation would be cause for termination. (Convergys Facts ¶ 41)

By April 18, 2002, Convergys changed Demirelli's starting time so that he would have less competition for the existing handicapped parking spaces in lieu of providing him an assigned parking spot. By April 18, 2002, Demirelli had received the other accommodations he requested, an assigned seat and headset. The purpose of these accommodations was to assist Demirelli in being punctual.[2] (Convergys Facts ¶¶ 60-64).

After April 18, 2002, Demirelli never again arrived late to work at the start of his shift. (Convergys Facts ¶ 66). However, between April 18, 2002 and his termination on June 27, 2002, Demirelli accumulated seventeen (17) new tardies returning from his meal break (even though he was sitting next to the door, no more than 100 feet from the break room). (Convergys Facts ¶¶ 50, 70). He also accrued a second "no call, no show" on May 19, 2002. (Convergys Facts ¶ 47). Even if Convergys erased all Demirelli's previous tardies, these seventeen (17) new tardies were cause for termination under Convergys' attendance policy which provided for termination after fourteen (14) tardies. Demirelli's second "no call, no show" was additional cause for termination. (Convergys Facts ¶ 14).

The only explanation Demirelli gave for these seventeen tardies was that he had hoped Convergys would forgive him the tardies and maybe dock his pay. He didn't ask for a longer daily meal break as an accommodation since, more often than not, he arrived back from his meal break on

[2] Whether Demirelli had to fight for these accommodations as he suggests or Convergys provided them is a matter of semantics. Either way Convergys had to approve his start time and assigned seating. What matters is whether these accommodations helped him to be on time.

time. (Convergys Facts ¶ 76, Reply). In essence, the only accommodation which Demirelli requested but did not receive was that Convergys not apply its attendance policy to him. (Convergys Fact ¶ 59, Reply).

The Americans with Disabilities Act (ADA) does not require an employer to eliminate an essential job function in order to provide a disabled employee with reasonable accommodations. Nor do Plaintiffs dispute that regular and reliable attendance, including punctuality, is an essential job function for most jobs. In affirming summary judgments for the employer, the Eighth Circuit has said time and again that adherence to attendance policies is an essential job function. Plaintiffs do not dispute, discuss or even attempt to distinguish the Eighth Circuit cases which Convergys cites in support of its position that punctuality is an essential job function. They dismiss *Earl v. Mervyns, Inc.*, 207 F.3d 1361 (11th Cir. 2000) which squarely holds that punctuality is an essential job function for a job that demands customer responsiveness, such as Demirelli's.

Plaintiffs do not dispute the facts upon which Convergys relies in support of the argument that punctuality is an essential job function for Demirelli's position. Instead, they argue that Convergys was lax in its enforcement of the attendance policy, relying upon (i) three unauthenticated documents[3] it sifted from the production of over three hundred of Convergys' personnel files and (ii) Convergys' patience with Demirelli's chronic tardiness. But Convergys should not be penalized for being too nice to Demirelli. *Van Zande v. State of Wisc. Dept. of Admin.*, 44 F.3d 538 (7th Cir. 1995). Every employer has a breaking point for its tolerance of chronic tardiness. Even the EEOC, in published advisory opinions, has said that "an employer does not have to tolerate chronic lateness." *See*, Ex. L.

[3] Rather than burden the record with the scores of records produced by Convergys which demonstrate enforcement of its attendance policy, it is enough for this Court to note that the evidence which EEOC proffers does not meet the standards for admissibility required in responding to a Motion for Summary Judgment. (Convergys Facts ¶ 16, Reply).

For all the reasons set forth below and in its original Motion for Summary Judgment, this Court should find that punctuality is an essential job function for Demirelli's position and that he was not a qualified individual, with or without reasonable accommodation. These findings are amply supported by the law and evidence and are dispositive. This Court should enter summary judgment in favor of Convergys.

I. Punctuality Is An Essential Job Function At Convergys

The following facts remain undisputed: Convergys is hired by clients to take calls based on forecasted call volume. (Convergys Facts ¶ 3). Demirelli's last supervisor, LaShonDa Aldridge testified: "The way the nature of our business works is that we have to have bodies in seats at particular times of the day to service customers." Convergys has contract obligations to answer a large percentage of customer calls within a minute or less. (Convergys Facts ¶ 23).

As a new employee, Demirelli managed to report to work on time, every day, for the first six months of his employment. (Convergys Facts ¶ 29, Pl. Fact ¶ 48).[4] After his first write up, Demirelli still managed to be on time by going "a little faster than usual." (Convergys Fact ¶ 33). His supervisors repeatedly counseled him about his tardies and he knew that it was important to be on time. (Convergys Facts ¶¶31, 39, 40, 42, 43). He was placed on final written warning on April 18, 2002 for his absences and tardiness. (Convergys Facts ¶¶ 45-46). Even after this warning, he was still tardy seventeen more times returning from his meal breaks. Ultimately, Convergys terminated him for tardiness. (Convergys Facts ¶ 57).

Plaintiffs do not dispute or even address Eighth Circuit law holding that regular and reliable attendance, including punctuality, is an essential function. *See, e.g. Pickens v. Soo Line Railroad,*

[4] It is undisputed that Loretta Hill was Demirelli's supervisor until November 1, 2001. (Convergys Facts ¶29-30). According to the *Plaintiffs'* Statement of Facts, Loretta Hill's depiction of Demirelli's attendance during the first six months was *accurate*. (Plaintiffs' Facts ¶ 13).

264 F.3d 773 (8th Cir. 2001); *Moore v. Payless Shoe Source, Inc.*, 187 F.3d 845, 848 (8th Cir.), *cert. denied.* 528 U.S. 1050 (1999); *Spangler v. Fed. Home Loan Bank of Des Moines*, 278 F.3d 847 (8th Cir. 2002); *Maziarka v. Mills Fleet Farm, Inc.*, 245 F.3d 675 (8th Cir. 2001). *See also, Kinnaman v. Ford Motor Co.*, 79 F.Supp.2d 1096 (E.D.Mo. 2000)(holding that reliable attendance established as an essential job function where employer provided repeated warnings to employee about attendance).

Plaintiffs' attempt to create an issue of fact as to whether punctuality was an essential job function at Convergys is makeweight. And the notion that punctuality is not essential because the word "punctual" is not in the job description is silly. All Agents receive the attendance policy that says Agents are expected to be on time, every day. (Convergys Facts ¶ 14, Ex. 2 to L. Ashton Depo. attached to Plaintiffs' Response as Ex. H).

Plaintiffs point to three documents purportedly showing Convergys did not always enforce its attendance policy to the letter. This does not prove Convergys was "lax" in enforcing its attendance policy or even raise a genuine issue of disputed fact. (Convergys Facts ¶ 16, Reply). Convergys employed approximately 800 employees in Hazelwood, Missouri at any given time. (Convergys Response to Plaintiffs Fact ¶¶ 48, 49). Such isolated instances do not demonstrate the sort of widespread disregard of attendance policy that would justify this Court in ignoring Convergys' undisputed emphasis on punctuality as an essential job function. See *Kinnaman v. Ford Motor Co.*, 79 F.Supp.2d 1096 (E.D. Mo. 2000)(granting summary judgment holding reliable attendance is an essential job function, and dismissing plaintiff's argument that employer's leniency on attendance rendered it not essential).[5]

[5] Plaintiffs' reliance on *Spulak v. K-Mart Corp.*, 894 F.2d 1150, 1155 (10th Cir. 1990) is misplaced. In *Spulak*, the court noted that the plaintiff had introduced evidence that his violations of company policy were wide spread and ordinarily would not have resulted in the severe sanctions that Spulak received. *See Id*. at 1154 (stating, "The record

Notwithstanding his performance reviews, Demirelli admits that he received repeated warnings about his tardiness, that he understood Convergys' policy, that he understood it was important to be on time to work, and that further offenses would lead to his termination. (Convergys Facts ¶¶ 14, 25, 27, 30, 31, 39, 42, 43). Demirelli believed that Convergys did not terminate him earlier for tardiness because it was trying to help him since he was in a wheelchair. (Pls. Facts ¶ 32). Convergys *was* trying to help him. Demirelli's supervisor, LaShonDa Aldridge, was "trying to work with Mr. Demirelli in *keeping* his employment, and he told me that he would do better and I believed him." (Convergys Facts ¶50)(emphasis added).

Plaintiffs, effectively, are asking the court to punish Convergys for not terminating Demirelli earlier. In doing so, they call upon the Court to ignore the fact that Convergys was the first and only company to employ Demirelli, and did so fully aware of his physical limitations. (Convergys Fact ¶ 4). Affirming summary judgment in *Vande Zande v. State of Wisc. Dept. of Admin.*, 44 F.3d 538 (7th Cir. 1995), Judge Posner flatly rejected such an argument:

> If the employer … bends over backwards to accommodate a disabled worker – goes farther than the law requires -- … it must not be punished for its generosity by being deemed to have conceded the reasonableness of so far reaching an accommodation. That would hurt rather than help disabled workers.

And, in *Equal Employment Opportunity Commission v. Hertz*, 7 Am. Disabilities Cas. (BNA) 1097 (E.D.Mich. 1998), the Court granted summary judgment against the EEOC where the employer lessened standards of work for disabled employees but terminated disabled employees when it could no longer tolerate non-performance:

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contains evidence that using the back door and failing to sign in and out were *widespread policy violations* that did not *ordinarily* precipitate a loss prevention investigation or a written reprimand.") (emphasis added). A .375% rate of permitting tardies beyond the terms of the attendance policy is hardly widespread. Further, Demirelli was tardy 102 times, far more often than the examples of terminations dredged up by Plaintiffs. (Convergys Reply to Pls. Facts ¶ 49).

> The teaching of the ancient fable is instructive: It took a child to point out to the crowd admiring what they thought was an ornately dressed emperor riding on a horse, that the emperor had no clothes on at all. EEOC's position fits that fable. One wonders why that agency is unable to see clearly what it is attempting to claim. Hertz should be complimented for what it tried to do here – not sued. How does EEOC expect to further the goal of assisting handicapped persons that employers will hire if it seeks to punish them for their generosity?

The employer defines the essential functions of a job. 42 U.S.C.A. § 12111(8) specifically provides that in determining whether one is a qualified individual with a disability, consideration must be given to the employer's judgment as to what job functions are essential. Likewise, the EEOC's appendix to 29 C.F.R. § 1630.2(n)(3) says that the inquiry into essential functions is not intended to second guess an employer's business judgment.

The essence of Convergys' business is that it relies upon its employees to be in their seats at scheduled times to respond to its clients' calls.[6] (Convergys Facts ¶ 23). When an employer requires an employee to perform his work at a specified location at a scheduled time, and the work cannot be deferred, dependable attendance is an essential job function as a matter of law. For example, in *Maziarka v. Mills Fleet Farm, Inc.*, the Eighth Circuit held that regular reliable attendance was an essential job function even though there was evidence that absenteeism did not in fact disrupt customer service, because plaintiff's job "requires that he be capable of regular and predictable attendance at a specified location in order to perform the tasks of receiving clerk." 245 F.3d 675, 681 (8th Cir. 2001).

Likewise, the Eleventh Circuit specifically held that punctuality was an essential job functions when the position required work to be performed on-time and could not be deferred to a later time of the work day. *Earl v. Mervyns, Inc.*, 207 F.3d 1361 (11th Cir. 2000)(holding that

[6] The fact that Convergys accounts for occasional Agent tardiness is inapposite. Obvious responsible business practice would dictate this given that Convergys' attendance policy allows for 14 tardies prior to dismissal. (Convergys Facts ¶ 14).

punctuality was essential job function even without evidence that tardiness disrupted operations - "[I]f Appellant were tardy in the morning, her area would not be ready for the usual influx of morning customers). *See also Jackson v. Veterans Admin.*, 22 F.3d 277, 279 (11th Cir. 1994)(affirming summary judgment and holding that plaintiff was not qualified because he could not be reliably on-time).[7]

Demirelli's job was nothing like the job of the plaintiff in *Coneen*, on which EEOC relies. 334 F.3d 318, 329 (3rd Cir. 2003). As a bank manager, *Coneen* was permitted to start work at a time of her choosing during a two hour window, not within 3 minutes of a scheduled start time like Demirelli. (Convergys Facts ¶ 14). She was not expected to arrive at work to handle customer demands but merely to set a "good example." *Id.* at 328. Notably, the Court in *Coneen* distinguished *Earl v. Mervyns Inc.*, 207 F.3d 1361 (11th Cir. 2000), on which Convergys relies, stating:

> MBNA cites *Earl v. Mervyns Inc.*, 207 F.3d 1361 (11th Cir. 2000) to support its assertion that setting an example can be an essential job function. However there the employee was charged with opening a department in a small retail store. Obviously customers will go elsewhere and sales will be lost if a retail establishment … cannot open according to its posted hours. Accordingly, an employer in those circumstances may be able to establish that punctuality is essential to the employee's job.

Id. at 328 (internal citations omitted) (emphasis added). Convergys has contractual obligations that require it to handle the forecasted volume of calls within a minute or less. (Convergys Facts ¶ 23). In order for Convergys to be able to meet its obligations to customers, customer service agents must be answering phones as scheduled and on time. As Convergys' former Senior Human Resources Manager testified, "It's a big, huge deal." (Convergys Facts ¶21). Because there are no genuine

[7] *Ward v. Massachusetts Health Research Institute, Inc.*, 209 F.3d 29 (1st Cir. 2000) is distinguishable because plaintiff, in *Ward*, was a data entry clerk who did not have to complete his work at any specified period of the day, but rather at any time of the day provided his work was completed before the beginning of the next business day.

issues of material fact, the Court should find that punctuality is an essential job function for the position of Agent at Convergys.

II. Demirelli Could Not Be On Time With or Without Accommodation And, Therefore, Is Not "Qualified" As a Matter of Law.

Because Demirelli could not be punctual with or without accommodation, as a matter of law he is not "qualified" under the ADA. It is undisputed that for the first six months of Demirelli's employment, at a time when Demirelli claims he was receiving no accommodations from Convergys, he was on time arriving to work every day. (Convergys Facts ¶33, Pls. Facts ¶¶33-38). Although, he experienced no changes in his personal circumstances that would have affected his attendance, Demirelli was increasingly tardy during the last year of his employment. (Convergys Facts ¶¶ 23, 31, 35, 40, 45). After his written warning in November 2001, Demirelli improved his punctuality simply by "trying to go a little faster." (Convergys Facts ¶ 33).[8] Demirelli admitted that by April 18, 2002, he had the accommodations he needed to arrive at work on time. (Convergys Facts ¶¶ 59, 76, Demirelli Depo. 137:6-138:35). Nevertheless, in the last two months of his employment, Demirelli returned late from his meal break 17 times, which alone exceeded the number of tardies Convergys allowed annually under its policy. (See Convergys Fact ¶¶ 14, 48, 50)

Although Demirelli never requested it, Plaintiffs suggest that Convergys should have given Demirelli an extended meal break. This suggestion does not create a triable issue since Demirelli plainly did not ask for it and whether such an "accommodation" would have been effective is pure speculation.[9] On the contrary, Demirelli's testimony indicates an extended meal break would not

[8] These facts, alone, belie the unsupported conclusion that Demirelli's tardiness was a result of his disability, and therefore required accommodation.

[9] Plaintiffs' claim that another Convergys employee received an extended meal break is immaterial. The employee to whom Plaintiffs refer had a *scheduled* meal break of 45 minutes, which meant that if that employee exceeded 45 minutes for his scheduled meal break, he would have been assessed a tardy just as any other employee. (Convergys

have been effective. When asked how much additional time he needed for lunch he answered "I cannot honestly say." (Convergys Fact ¶79, Demirelli Depo. 160:13-15). Demirelli really only wanted Convergys to forgive his tardies. Specifically, Demirelli testified as follows:

> Q: So, essentially, you were asking that the 30-minute lunch policy with the three-minute grace period not apply to you, that you get more time than anybody else; is that fair to say?
> A: I was requesting that accommodation would be made on account of my physical condition.
> Q: Okay. And you were requesting that they ignore your tardies or that you get more time every single time you went to lunch?
> A: …I was simply requesting, if I do have so many tardies, that if they could maybe be forgiven because of my situation. *But I was really not requesting, okay, always give me extra time for lunch*, that they change the rule for me.

(Convergys Fact ¶ 79, Demirelli Depo. 157:4-24)(emphasis added).

With this proposed accommodation, Plaintiffs suggest that "Demirelli could have reported to work on time had Convergys accommodated him." This is just circular reasoning. Plaintiffs are suggesting that Demirelli could have been on time if only he did not *have to be on time.* The ADA does not require an employer "to change the essential nature of the job" in order to accommodate the employee's disability. *Mole v. Buckhorn Rubber Products, Inc.*, 165 F.3d 1212, 1218 (8th Cir. 1999)(*quoting Boelman v. Manson State Bank*, 522 N.W.2d 73, 81 (Iowa 1994)). *See also Equal Employment Opportunity Commission v. Sara Lee Corporation*, 237 F.3d 349, 353- (4th Cir. 2001)(*affirming* summary judgment against EEOC, and *stating* "Indeed the [ADA] speaks in terms of accommodations, not exceptions"). Plaintiffs' suggested accommodation that Demirelli be exempt from Convergys' attendance policy is unreasonable as a matter of law. *See, Earl v. Mervyns*, 207 F.3d at 1367 (Stating that "The only 'accommodation' Appellant identified was to allow her to clock in at whatever time she arrived, without reprimand, and to permit her to make up

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Response to Plaintiffs Fact ¶ 44). On the other hand, Demirelli wanted to be forgiven his tardies and to be unaccountable to any fixed attendance requirements.

the missed time at the end of her shift" and *holding* that the proposed accommodation was not reasonable.")[10]

Because Demirelli cannot show that he could be punctual, with or without reasonable accommodation, Convergys is entitled to judgment as a matter of law. "Summary judgment is proper if the plaintiff fails to establish any one of the elements of his or her *prima facie* case." *Kinnaman* 79 F.Supp.2d at 1101.

III. Demirelli's Failure to Maintain Employment Authorization Renders Him Not Qualified, As a Matter of Law, and Ineligible for Reinstatement, Backpay and Frontpay.

For Demirelli to be "qualified" under the ADA, EEOC must prove *both* that (1) he can perform the essential job functions with or without reasonable accommodations *and* (2) that he meets the necessary prerequisites for the job. *Hatchett v. Philander Smith College*, 251 F.3d 670, 674 (8th Cir. 2001)(emphasis added). As a matter of federal law, an employee must have the legal right to work in the U. S. as an absolute prerequisite to *every* job. 8 U.S.C.A. § 1324a. Plaintiffs cannot show that Demirelli had the legal right to work in the U. S. at all times during his employment.

There is absolutely no evidence that Demirelli had work authorization from September 9, 2001 to April 5, 2002.[11] (Convergys Facts ¶ 54, Convergys' Reply to Pls. Fact ¶ 63). In order to demonstrate that an alien has the legal right to work in the U.S., he must produce a document

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[10] In attempting to distinguish itself from the facts of *Earl v. Mervyns*, Plaintiffs misrepresent the facts of the case. Specifically, Plaintiffs claim that the plaintiff in *Earl* failed to identify any accommodation, resulting in the dismissal of her case. (Pls' Opposition, p. 10). On the contrary, the plaintiff identified *the same accommodation proposed by Demirelli* – namely that she be exempted from the employer's attendance policy and held that it was not reasonable. *Id.* at 1367.

[11] Demirelli did provide Convergys with a work authorization, an I-9 form, at the time he was hired. It expired September 9, 2001. Notably, despite his obligation to maintain work authorization, he failed to do so. Demirelli never provided Convergys with any evidence of work authorization after September 9, 2001.

evidencing that he was legally authorized to work, with the acceptable documents expressly identified under federal regulation and specified on Form I-9. Neither Demirelli nor the USCIS have any such document in their files. In fact, there is no evidence that Demirelli had the legal right to work in the U.S. at any time between September 9, 2001 and April 5, 2002 or since April 2003 when his employment authorization document expired. (Convergys Facts ¶ 55).[12] Demirelli's self-serving affidavit that he "believed" he had work authorization between September 9, 2001 and April 5, 2002 does not satisfy Plaintiffs' *prima facie* burden. The Supreme Court does not permit Plaintiffs to avoid summary judgment merely by raising "some metaphysical doubt as to the material facts." *Matsushita Electrical Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Demirelli's "belief" that he had work authorization is also plainly inconsistent with his deposition testimony. Demirelli admitted in his deposition that his work authorization lapsed for about six months while he was employed by Convergys (although he was uncertain of the exact dates). (Convergys' Response to Plaintiff Fact ¶ 63).

Had Demirelli applied for a job at any time between September 9, 2001 and April 5, 2002, he would have been required to complete an I-9 form and produce official documentation showing he had the legal right to work in the U.S. His "belief" that he had the right to work is no substitute. It would not have been enough for an employer to legally hire him nor can it support Plaintiffs' *prima facie* case. (See, e.g. Plaintiffs Fact ¶ 68).[13]

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[12] Plaintiffs basically admit that Demirelli has not had work authorization since April 23, 2003. (See Pls.' Resp. to Convergys Fact ¶ 55). Chester Moyer, the head officer of the USCIS, testified that there is no evidence suggesting or evidencing that Demirelli's April 2003 application was ever approved. (Moyer Depo. 40:23-42:3). Demirelli's Affidavit that he "last applied" for work authorization in 2003 is silent on the question of whether he actually received it. (Demirelli Aff. ¶ 8).

[13] Plaintiffs' suggestion that this Court should accept Demirelli's subjective belief to establish his prima facie case would lead to ridiculous results: such as allowing a bus driver's claim for reinstatement where he could not produce a driver's license, or a finding that a lawyer is qualified as a matter of law based on testimony that he sat for the bar and believed he passed, without any evidence of admission.

The decision of *Egbuna v. Time Life Libraries,Inc.*, 153 F.3d 184 (4th Cir. 1998) supplies the basis for the decision here and Plaintiffs cite no contrary authority that Demirelli was not qualified, as a matter of law, between September 9, 2001 and April 5, 2002. Their attempt to distinguish *Egbuna* fails. The question is not whether Demirelli had the legal right to be present in the United States. The question is whether Demirelli had the legal right to work in the United States at the time of the alleged adverse employment actions, i.e. the time when Demirelli claims Convergys failed to provide him reasonable accommodations. Like Egbuna, Demirelli did not have the legal right to work in the U. S. at the time of the alleged adverse employment actions. Whether Demirelli *could* have obtained continued work authorization doesn't matter. Without actual work authorization, he was not qualified. *Egbuna*, 153 F.3d at 186.

Demirelli's inability to work in the U. S. since April, 2003, also is fatal to his claim for reinstatement, backpay and front pay. *Hoffmann Plastic compounds, inc. v. NLRB*, 535 U.S. 137 (2002); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984); *Escobar v. Spartan Security Service, Inc.*, 281 F.Supp.2d 895 (S.D.Tex. 2003). Plaintiffs seem to concede that reinstatement is not possible but argue that he is still eligible for an award of backpay. *See* Plaintiffs' Memo. In Opposition, pp. 19-20. Plaintiffs rely for recovery of backpay on *Flores v. Amigon*, 233 F.Supp.2d 462, 464 (E.D.N.Y. 2002). *Flores* has no application here. The plaintiff in Flores was seeking back pay under the FLSA for work she had actually performed. *Id*. The Court in *Flores* specifically distinguished *Hoffman* on the grounds that in *Hoffman* applied to workers seeking back pay for work *not* performed. *Id*. at 463-464. In this case, Demirelli is not seeking back pay for work he has already performed. Consequently, it is *Hoffman*, binding United States Supreme Court precedent that applies, and not *Flores*. Pursuant to *Hoffman*, Demirelli cannot, as a matter of law, be considered ready to work or able to accept employment for any period of time that he lacked

employment authorization, if at all. 535 U.S. 151; *See also Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984)(precluding backpay prior to IRCA for any period of time alien lacked employment authorization). Based on the authorities cited above, this Court should enter summary judgment in favor of Convergys because, as a matter of law, without proof of work authorization, Demirelli was not a qualified individual or eligible for reinstatement, backpay or front pay under ADA.

IV. Conclusion

Convergys hired Demirelli to sit in his seat at a specific time to answer telephone calls. His work could not be deferred, or set aside until he was back at his seat. Punctuality was an essential function of his job. The only accommodation Demirelli claims he needed that he did not get was complete forgiveness of his tardiness. As a matter of law, exemption from an essential job function is not a reasonable accommodation.

Summary judgment is also appropriate because Plaintiffs cannot make a *prima facia case* that Demirelli had the legal right to work in the U. S. at all times during his employment. It is undisputed that Demirelli has not had the legal right to work in the U. S. since April, 2003 and Plaintiffs have raised no genuine issue of material fact to dispute that he was not legally authorized to work in the U.S. between September 9, 2001 and April 5, 2002. Absent proof of work authorization, Demirelli was not a qualified individual, and is not eligible for reinstatement, backpay or frontpay under the ADA.

For the reasons stated above, and those more fully explained in Convergys' original Motion for Summary Judgment, Convergys respectfully requests that this Court find that there is no material disputed question of law or fact and enter summary judgment in favor of Defendant Convergys.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Reply Memorandum In Support of Defendant's Motion Summary Judgment was served electronically with the Clerk of the Court this 15th day of November, 2005 to be served by operation of the Court's electronic filing system upon Barbara Seeley, Equal Employment Opportunity Commission 1222 Spruce Street, Room 8.100, St. Louis, MO 63103 and to Michael Fagras, Attorney for Ahmet Demerelli, 4700 Mexico Road, St. Peters, MO 63304.

/s/ Laura M. Jordan