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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

SARA LEE CORPORATION,

Defendant.

C.A. #4:99-522-23

**ORDER**

This matter is before the Court upon Defendant's motion for summary judgment on Plaintiff's cause of action under the Americans With Disabilities Act (hereinafter "ADA").

## I. BACKGROUND

The essence of Plaintiff Equal Employment Opportunity Commission's (hereinafter "EEOC") Complaint is that in April 1997, Defendant Sara Lee Corporation (hereinafter "Sara Lee") refused to accommodate the disability of Vanessa Turpin (hereinafter "Turpin"), and discharged her on May 31, 1997, because of her disability. Viewed in the light most favorable to the EEOC, the record establishes the following facts:

### A. Turpin's Impairment

In 1992, while working at the Sara Lee plant in Salem, Virginia, Turpin began experiencing seizures in her sleep. Turpin Depo. at 50. She first learned about these seizures from her then-husband, who observed Turpin's seizures while sleeping next to her. *Id.* Turpin eventually consulted with a neurologist, who prescribed Dilantin, an anti-seizure medication. *Id.* at 53-55. Despite the medication, and a subsequent increase in dosage, Turpin continued to

experience nocturnal seizures. *Id.* at 55-57.

After transferring to Sara Lee's Florence facility in early 1996, Turpin's seizures grew worse. Turpin Depo. at 137, 138. She began to regularly experience nocturnal seizures throughout 1997,[1] and she also began having daytime seizures as well. *Id.* at 138; Gethers Depo. at 10 (testifying that, during the time when Turpin worked at the Florence facility in 1997 and he spent every other weekend with her, that she had nocturnal seizures every weekend he was with her). According to Turpin's current husband, Benjamin Gethers, Turpin's nocturnal seizures were characterized by shaking, kicking, salivating, and bedwetting. *Id.* at 10-11. Gethers stated that she would also bite her tongue during the nighttime seizures, causing eating and drinking problems the next day. *Id.* at 12, 31. These nocturnal seizures would leave Turpin feeling tired in the morning, as if she had not caught a wink of sleep. Turpin Depo. at 204 (asserting that after having a nocturnal seizure, she feels like she had "never slept at all").

Turpin herself was typically unaware that she was experiencing a nocturnal seizure, and could not remember them. Turpin Depo. at 170 (stating that she does not know how frequently she has the nocturnal seizures). She would only become aware that she had experienced a nocturnal seizure when either Gethers would shake her awake, or when she would awaken to find her bed covers tossed onto the floor and her arm or leg bruised. *Id.* at 57.

Turpin also regularly experienced daytime seizures, including four or five while at work. *Id.* at 140; *see also* Gethers Depo. at 29 (testifying that he witnessed Turpin having a daytime seizure many times in 1997, when he would see Turpin every other weekend). Turpin stated that

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[1]Since Turpin alleges that she was discharged from Sara Lee on May 31, 1997, the relevant time period for assessing her disability is the period surrounding her May 1997 discharge.

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she could discern when the seizure was about to hit, and she would thus go off to sit elsewhere until the spell would pass, during which she would "zone out," and experience dizziness and weakness. *Id.* at 139. According to Gethers, Turpin would begin shaking, her face would take on a blank expression, and she would be completely unaware of, and unresponsive to, her surroundings. Gethers Depo. at 13-15, 22 (asserting that during one daytime episode, "it looked like she was lost;" during another at the kitchen table, she just kept stirring her food "like a kid would do when they don't want it;" and during another in the car, she kept repeatedly blowing the horn, totally unaware of her actions). The daytime seizures would generally last for a few minutes, and after the seizure would end, Turpin was able to resume whatever activity she had been performing before the seizure occurred. Turpin Depo. at 139 (testifying that when she returned from the bathroom just after experiencing a seizure at work, "I just act like everything all right"); Gethers Depo. at 15 (stating that after experiencing one particular daytime seizure, "she came back about normal"); *cf. id.* at 38 (stating that after experiencing a daytime seizure, Turpin is tired and does not "want to be bothered").

Turpin's treating physician since 1997, Dr. Healy, diagnosed Turpin's condition as complex partial seizure disorder (epilepsy). He asserted that during Turpin's seizures, "there's not often a lot of motor activity, so it's not a major motor or a grand mal seizure," but rather a "complex partial" seizure. Healy Depo. at 9-10. Dr. Healy stated that typically, when persons with Turpin's disorder suffer a seizure,

> they lose contact with their surroundings, and they become unresponsive to the surroundings. They may not lose muscle tone and fall. They may still continue to sit there or stand there, but they are not aware of what's happening. And then after a period of time, then the seizure abates, and they are fine. They are back in contact. After that they may be confused or they may not necessarily be

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> normal, but they are then alert and awake, and you can talk with them. But there's a period of time when they are not in contact with the environment.

Healy Depo. at 40. Dr. Healy went on to state that this was the type of consciousness altering which Turpin underwent during her seizure spells. *Id.*

In addition to the above-stated symptoms, Gethers testified that incidents of forgetfulness occurred on a regular basis during Turpin's employment with Sara Lee. Gethers Depo. at 21, 26, 37-38. Dr. Healy also stated that Turpin's seizures have caused her to suffer memory loss and confusion. Healy Depo. at 21, 25, 45-46 (adding that Turpin's particular disorder is commonly associated with memory disturbance). Dr. Healy found that her memory loss made it difficult for Turpin to remember to take her medication more than once per day. *Id.* at 21; *see also* Turpin Depo. at 77 (stating that she told Dr. Healy that she was having difficulty remembering to take her second dosage). He also stated that Turpin, while driving to his office on one occasion, forgot how to get there. Healy Depo. at 45-46; *see also* Turpin Depo. at 75 ("My memory got so bad, I . . . couldn't find the doctor.").

Turpin's problems with seizures have continued, and Dr. Healy believes that her seizures will be a "life-long phenomena." Healy Depo. at 43-44. Gethers estimates that Turpin suffered numerous seizures in 1997, approximately twenty daytime seizures in 1998, and between thirty and forty seizures in 1999. Gethers Depo. at 27-29. She still has both nocturnal and daytime seizures approximately once or twice a week, and suffers incidents of memory loss about two to three times a week. *Id.* at 12, 17, 25-26, 37.

**B. Turpin's Employment History With Sara Lee**

Turpin began working for Sara Lee on September 14, 1989, at its Salem, Virginia,

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factory. In 1996, Sara Lee closed the Salem facility due to its decision to downsize operations, and Turpin transferred to Sara Lee's Florence, South Carolina, facility. Wofford Depo. at 24. At the Florence plant, Turpin worked the first shift as an Auto Packaging Machine Operator. Wilson Depo. at 26.

In the spring of 1997, Sara Lee closed its Hartsville, South Carolina, plant pursuant to its downsizing plan. Wofford Depo. at 27, 28. Sara Lee offered its Hartsville employees the choice of displacing the least senior employee at other facilities, in accordance with Sara Lee's seniority policy. The seniority policy, which, based on the record before the Court, seems to be an internal policy of Sara Lee and is in any event not part of a collective bargaining agreement,[2] provides that an employee displaced from his or her job may "bump" a less senior employee in the same or similar position at another facility.[3] Since the Florence facility was geographically

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[2]As Sara Lee states in its brief supporting summary judgment,

> It is undisputed that the Hosiery Division is non-union and that its policies are not promulgated pursuant to a collective bargaining agreement. Metcalf Aff. Para 6. However, the Hosiery Division considers itself to be bound by its policies; moreover employees are very aware of the policies and consider them "sacred." *Id.* Defendant's Brief at 6.

[3]Defendant's Brief at 6 (citing Metcalf Aff. at ¶ 6). The seniority policy provides that, when a facility closes, that facility's employees may relocate to another facility, and may displace a less-senior employee at the new facility if (1) the less-senior employee holds the same position and shift that the bumping employee held at the closed facility; (2) the less-senior employee holds the same position as, but works a different shift than, the bumping employee; (3) the less-senior employee holds a position that the bumping employee previously held during his employment with Sara Lee's Hosiery Division; or (4) the less-senior employee is in a position of the same or lower job level. Metcalf Aff. at para. 9. Sara Lee asserts that it has previously applied this practice consistently to the closings of facilities in Rockingham and Lumberton, North Carolina; Bennettsville, South Carolina; Champaign, Illinois; Olive Branch and Jackson, Mississippi; and the Los Angeles, California, region. Defendant's Brief at 6.

closest to Hartsville, most of the Hartsville employees who had seniority status entitling them to bump less senior Florence employees elected to transfer to the Florence plant. Defendant's Brief at 8 (citing Human Resources Manager Wilson Aff. at ¶ 4). Based on the seniority plan, a Hartsville employee with more seniority could, and eventually did, bump Turpin from her first shift position.

After being informed that she would likely be bumped off of her first shift, but before actually being bumped, Turpin requested an accommodation by presenting her Human Resources Manager, Vera Wilson, with a letter dated April 9, 1997, from her internist, Dr. Ducker. Wofford Depo. at Ex. 1; Wilson Depo. at 34, 56; Turpin Depo. at 149. Dr. Ducker stated in this letter that, after consulting with Turpin's neurologist, Dr. Healy, it was his opinion that Sara Lee should allow Turpin be to remain on first shift because "it is a well known fact that recurrent seizure activity can be precipitated by disturbance of sleep pattern."[4] Wilson in turn advised Robert Wofford, another Human Resources Manager and her corporate contact in Winston-Salem, North Carolina, that Turpin desired to remain on first shift, and that she had presented a physician's note to support her request. Wilson Depo. at 61. Wilson then faxed Wofford the letter. *Id.* at 56. At no time did Wilson speak to Dr. Ducker or Dr. Healy. *Id.* at 57-58.

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[4]Wofford Depo. at Ex. 1. The letter states in relevant part:

> I am writing on behalf of Vanessa Lynn Turpin, a patient of mine with known seizure disorder. Currently she is well managed with this regard on anti-epileptic medication. I have spoken with her neurologist, Dr. Joseph Healy, secondary to concerns that possibly she may be changed to a second and third shift assignment. I would respectively request that she remain on a first shift assignment as it is a well known fact that recurrent seizure activity can be precipitated by disturbance of sleep pattern.

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Wofford then telephoned Sara Lee's Corporate Medical Director, Dr. Egnatz, to discuss Dr. Ducker's letter. Wofford Depo. at 44; Egnatz Depo. at 14-15. Dr. Egnatz told Wofford that ordinarily an individual suffering from a seizure disorder requires a regular and non-rotating shift, but not necessarily a day shift. Dr. Egnatz Depo. at 13-15. In other words, Dr. Egnatz believed that as long as an individual with Turpin's disorder was working a non-rotating shift, whether it was the first, second, or third shift would be of no consequence, because a constant shift would not cause any disturbance to the individual's sleep patterns once the individual had adjusted to the shift. *See id.* at 15. At no time did either Wofford or Dr. Egnatz speak with Dr. Ducker or Dr. Healy.

Wofford subsequently called Wilson back, and based on Sara Lee's seniority policy, told her to offer Turpin three options: (1) move to second or third shift; (2) go on layoff status with recall rights for twelve months (including the right to be recalled to a first shift position should one become available); or (3) take a severance package. Wilson Depo. at 61-62. Wilson accordingly offered Turpin these three choices, and Turpin accepted the severance package. *Id.* at 63; Turpin Depo. at 151.

Turpin then filed a charge of discrimination with the EEOC, which found cause and filed a Complaint on February 26, 1999. Sara Lee filed the instant motion for summary judgment, along with an accompanying memorandum, on December 10, 1999. The EEOC filed a response brief on January 7, 2000, and Sara Lee filed a reply on January 21, 2000.

## II. SUMMARY JUDGMENT STANDARD

To grant a motion for summary judgment, this court must find that "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). The judge is not to weigh the evidence, but

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rather to determine if there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). If no material factual disputes remain, then summary judgment should be granted against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party bears the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). All evidence should be viewed in the light most favorable to the non-moving party. *Perini Corp. v. Perini Constr., Inc.*, 915 F.2d 121, 123-24 (4th Cir. 1990). "[W]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate." *Teamsters Joint Council No. 83 v. Centra, Inc.*, 947 F.2d 115, 119 (4th Cir. 1991). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. The "obligation of the nonmoving party is 'particularly strong when the nonmoving party bears the burden of proof.'" *Hughes v. Bedsole*, 48 F.3d 1376, 1381 (4th Cir. 1995) (quoting *Pachaly v. City of Lynchburg*, 897 F.2d 723, 725 (4th Cir. 1990)). Summary judgment is not "a disfavored procedural shortcut," but an important mechanism for weeding out "claims and defenses [that] have no factual basis." *Celotex*, 477 U.S. at 327.

## III. DISCUSSION

Pursuant to *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the EEOC has the initial burden of proof in establishing a *prima facie* case of discrimination by a preponderance

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of the evidence.[5] The EEOC has established a *prima facie* case under the ADA if it has shown that "(1) [Turpin] was in the protected class; (2) she was discharged; (3) at the time of discharge, she was performing her job at a level which met her employer's legitimate expectations; and (4) her discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination."[6] "The burden of establishing a *prima facie* case rests with [the EEOC], and if it fails to establish every element of its claim, summary judgment in favor of [Sara Lee] is proper." *Hindman v. Greenville Hosp. Sys.*, 947 F. Supp. 215, 220 (D.S.C. 1996) (citation omitted). While the EEOC's burden of establishing a *prima facie* case is not onerous, "it is also not empty or perfunctory." *See Ennis v. National Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 58 (4th Cir. 1995) (citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981)). "[The EEOC's] evidence must be such that, if the trier of fact finds it credible, and

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[5] *Ennis v. National Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 58 (4th Cir. 1995). The standard of proof in a Title VII case is the same as in an ADA case. *Id.* at 57 n.1.

[6] *Ennis v. National Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 58 (4th Cir. 1995) 53 F.3d at 58. The Fourth Circuit utilizes two analytical frameworks for ADA claims. *Riley v. Weyerhaeuser Paper Co.*, 898 F.Supp. 324, 326 (W.D.N.C. 1995) (citation omitted). *Ennis* ruled that the *McDonnell Douglas* scheme of proof applies to claims brought under the ADA. *Id.* (citing *Ennis*, 53 F.3d at 59). "This framework is utilized in cases where the employer articulates a legitimate, non-discriminatory justification for terminating a disabled employee's employment." *Id.* (citation omitted) In cases where the employer relies upon the employee's disability in terminating the employee, courts apply the three-pronged analysis as articulated in the case of *Tyndall v. National Educ. Centers*, 31 F.3d 209 (4th Cir.1994). Here, Sara Lee asserts that Turpin was bumped from her first-shift position pursuant to its seniority policy, and that it consequently offered her the three choices of accepting a second- or third-shift assignment, going on layoff status with recall rights, or taking severance pay, and that Turpin chose the last option. Thus, Sara Lee has offered a legitimate, non-discriminatory reason for Turpin's severance from the company. The Court accordingly will analyze the EEOC's ADA claim by utilizing the *McDonnell Douglas* scheme of proof pursuant to *Ennis*.

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[Sara Lee] remains silent, [the EEOC] would be entitled to judgment as a matter of law." *Id.* (citing *Burdine*, 450 U.S. at 254).

If the EEOC can meet this initial burden of proof, the burden will shift to Sara Lee "to articulate some legitimate, nondiscriminatory explanation which . . . would support a finding that unlawful discrimination was not the cause of the employment action." *Id.* Once Sara Lee satisfies this burden of production, the presumption created by the *prima facie* showing "'drops out of the picture,' and the plaintiff bears the ultimate burden of proving that she has been the victim of intentional discrimination." *Id.* (quoting *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2746-49 (1993)). The EEOC must produce evidence that Sara Lee's true reason for discharging Turpin was discriminatory, and it is not enough for the EEOC to state that Sara Lee's reasons are not credible. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993). Rather, "a reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason [for the discharge]." *Id.* at 515.

**A. Was Turpin "Disabled" as Defined by the ADA?**

To determine whether the EEOC has established a *prima facie* case under the ADA, the Court turns to analyze the first element of whether Turpin had a disability at the time of her discharge on May 31,1997. The ADA describes three subsets of disability, any one of which can trigger the statute's protections. The ADA states:

> The term "disability" means, with respect to an individual--
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment.

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42 U.S.C.A. § 12102(2) (West 1995). Because the statute defines "disability" for each of

subparts (A), (B), and (C) "with respect to the individual," the statute's individualized focus requires courts to make a case-by-case determination of whether a plaintiff has a disability. *See Ennis*, 53 F.3d at 59-60; *Runnebaum v. Nationsbank of Maryland, N.A.*,123 F.3d 156, 169 (4th Cir. 1997).

The EEOC does not assert that Turpin had a record of an impairment or that she was regarded as having an impairment. The Court thus analyzes her case under Subsection (A), which defines "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities" of the individual in question. In *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998), the Supreme Court enunciated a three-step process for determining whether a plaintiff has such a disability. *See Colwell v. Suffolk County Police Department*, 158 F.3d 635, 641 (2d Cir. 1998). Under this inquiry, this Court must first determine whether Turpin suffered from a physical or mental impairment. *Bragdon*, 524 U.S. at 631. Next, the Court must identify the life activity upon which Turpin relied and decide whether it constitutes a "major life activity" pursuant to the ADA. *Id.* Finally, the Court must inquire whether Turpin's impairment "substantially limited" a major life activity earmarked in the previous step. The EEOC must satisfy all three prongs "[i]n order to be eligible to prevail upon a further showing of discrimination." *Colwell*, 158 F.3d at 641.

**1. Impairment**

Sara Lee does not dispute that epilepsy constitutes an impairment under the ADA and its regulations. *See* Defendant's Brief at 16 (stating that for the purposes of summary judgment, this is not disputed). The Court thus finds that Turpin's epilepsy constitutes an impairment pursuant to the ADA. *See Equal Employment Opportunity Commission v. Kinney Shoe Corp.*, 917 F.

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Supp. 419, 425 (W.D. Va. 1996) ("[F]ederal regulations support the conclusion that epilepsy should normally be considered an impairment under the ADA.") (citing *Eckles v. Consolidated Rail Corp.*, 890 F. Supp. 1391, 1398 (S.D. Ind. 1995) (citing 29 C.F.R. Part 1630 App. and 29 C.F.R. § 1615.103))).

**2. Major life activity**

A "major life activity" is a basic activity that the average person can perform with minimal or no difficulty. *Pack v. Kmart Corp.*, 166 F.3d 1300, 1305 (10th Cir. 1999). Major life activities include, but are not limited to, functions such as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i); *see* 29 C.F.R. Part 1630, App. § 1630.2(i) (including sitting, standing, reaching, and lifting). "[T]he touchstone for determining an activity's inclusion under the statutory rubric is its significance." *Bragdon*, 524 U.S. at 638. The Court must decide whether the activity is significant within the contemplation of the ADA, rather than whether Turpin herself considered the activity to be important. *Colwell*, 158 F.3d at 642 (citing *Bragdon*, 524 U.S. at 637).

Turpin asserts that her nocturnal seizures substantially limited her in the major life activity of sleeping. As the Ninth Circuit recently stated, "[c]ommon sense suggests that sleeping is . . . a major activity in the lives of most people. A person who gets the recommended eight hours of sleep a day spends one-third of each 24-hour day sleeping. Moreover, sleeping is indispensable to the maintenance of personal health." *McAlindin v. County of San Diego*, 2000 WL 29658, *5 (9th Cir., Jan. 18, 2000). Accordingly, the Court rules that sleeping is indeed a major life activity under the ADA. *See id.* (holding same); *Pack*, 166 F.3d at 1305 (same); *Colwell*, 158 F.3d at 643 (same).

The EEOC also asserts that Turpin's seizures substantially limited her in the major life activity of thinking, including her abilities to concentrate and remember. As "thinking is inescapably central to anyone's life," *Taylor v. Phoenixville School District*, 184 F.3d 296, 307 (3d Cir. 1999), and since concentration and memory retention affect one's ability to think, the Court finds that thinking, including its components of concentrating and memory retention, is a major life activity as contemplated by the ADA. *See e.g., id.* (holding that thinking is a major life activity); *see also Pack*, 166 F.3d at 1305 (holding that concentration is not a major life activity itself, but rather a component of major life activities such as working, learning, or speaking)

In addition, the EEOC claims that Turpin's seizure activity, combined with the impact on her abilities to sleep, think, concentrate, and remember, substantially limited her in the major life activity of caring for herself. Since caring for oneself is explicitly listed as a major life activity under 29 C.F.R. § 1630.2(i), the Court holds that this is a third area of major life activity which Turpin has alleged her seizures substantially limited.

Finally, the EEOC maintains that during Turpin's daytime seizures she experienced an "altered consciousness," which caused an interruption to virtually all of her major life activities, including seeing, hearing, walking, communicating, thinking, concentrating, and caring for herself. Obviously, these constitute major life activities pursuant to the ADA.

**3. Substantially Limits**

The Court now turns to consider whether Turpin's epilepsy substantially limited her in the above-stated major life activities. The EEOC Regulations define "substantially limits" as being either "[u]nable to perform a major life activity that the average person . . . can perform,"

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or "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. § 1630.2(j)(1)(i) & (ii). In determining whether an impairment substantially limits an individual's ability to perform a major life activity, courts accordingly should consider (1) the nature and severity of the impairment, (2) its duration or expected duration, and (3) any permanent or long-term impact, or expected permanent or long-term impact. 29 C.F.R. § 1630.2(j)(2); *Williams v. Channel Master Satellite Systems, Inc.*, 101 F.3d 346, 349 (4th Cir. 1996). Moreover, since the impairment must impose a "substantial limitation" on the individual's major life activities, the Fourth Circuit has held that "the impairment must be a significant one." *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir.1986)); *see Runnebaum*, 123 F.3d at 167 (same) (citing *Byrne v. Board of Educ.*, 979 F.2d 560, 564 (7th Cir.1992)). Finally, the Court must consider any mitigating or corrective measures undertaken by Turpin with regard to her alleged substantial limitations, such as medications. *Sutton v. United Airlines,* Inc., 119 S. Ct. 2139, 2146-47 (1999); *see Pack*, 166 F.3d at 1305-06 (citation omitted).

Regarding her ability to sleep, Turpin does not state that she was completely unable to sleep. Thus, the Court must inquire as to how Turpin's ability to sleep compares with the average person in the general population. Turpin states that she experienced nocturnal seizures that interrupted her sleep as often as twice as week. Plaintiff's Brief at 20 (citing Gethers Depo. at 12, 17, 25-26; Turpin Depo. at 169). During the seizures, Turpin allegedly would kick, shake, salivate, and wet her bed. *Id.* (citing Gethers Depo. at 10-11). As a result, Turpin would bite her tongue, bruise her arms and legs, and occasionally fall to the floor. *Id.* (citing Gethers Depo. at

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12, 31; Turpin Depo. at 52, 57). On the days following the nighttime seizures, Turpin states that she would feel significantly fatigued, as if she had not slept at all, and consequently would not want to engage in everyday activities. *Id.* at 20-21 (citing Turpin Depo. at 204; Gethers Depo. at 38-39).

The evidence therefore shows that Turpin had her sleep interrupted twice a week due to nocturnal seizures. However, the EEOC's own guidelines state that "[s]leeping is not substantially limited just because an individual has some trouble getting to sleep or occasionally sleeps fitfully." EEOC Guidance on Psychiatric Disabilities And the Americans With Disabilities Act, EEOC Compliance Manual (BNA) No. 59, at E-2 n.16 (March 27, 1997) (App. Vol. II at 532); *see Pack*, 166 F.3d at 1306 n.6 (citing the same). Here, the evidence shows nothing more than that Turpin experienced fitful nights of sleep twice a week, a condition which affects many adults. *See Colwell*, 158 F.3d at 644 (noting that "[d]ifficulty sleeping is extremely widespread"). On the basis of this evidence, the EEOC has failed to show that Turpin's sleeping affliction is any worse than that which a large segment of the nation's adult population suffers from. *See id.* (holding same).[7] Accordingly, the Court finds that Turpin's seizures did not substantially limit her ability to sleep. *See Pack*, 166 F.3d at 1306 (finding that the plaintiff's episodes of sleep disruption and/or waking without feeling rested were not sufficiently severe or long-term to constitute a substantial impairment).

The Court now turns to the EEOC's claim that Turpin's seizures substantially limited her ability to think, including her abilities to concentrate and remember things. Dr. Healy testified

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[7]The Court notes that the EEOC failed to provide any evidence regarding the average person's ability to sleep soundly.

that poor memory and confusion are indeed epileptic phenomena. Plaintiff's Brief at 7 (citing Healy Depo. at 9, 17, 25, 28, 38, 45-46). The EEOC points out that Gethers noticed that Turpin seemed to forget things two or three times a week while working for Sara Lee. Plaintiff's Brief at 5 (citing Gethers Depo. at 26, 37). When asked specifically about what types of things Turpin would forget, Gethers stated that "[i]f you call and tell her something, she need to write it down sometime, not every time. Some things she's fine on her memory, and then again, you know . . . The memory thing I would say [occurs] a couple times a week, not every day. Some days she's okay." Gethers Depo. at 37. As further evidence of her memory problems, Turpin also recounts that while driving to Dr. Healy's office on one occasion, even though she had been there before, she forgot how to get there. Plaintiff's Brief at 7 (citing Turpin Depo. at 75; Healy Depo. at 45-46). Due to her memory problems, Turpin also experienced difficulty switching to a new anti-seizure medication because she could not remember to take the medication more than once per day. *Id.* at 6 (citing Turpin Depo. at 77). The EEOC also notes that Turpin could not recall the answers to many questions asked during her deposition on May 5, 1999.[8]

This evidence thus shows, during the relevant time period of May 1997 when she left Sara Lee, that Turpin experienced one occasion where she forgot where her doctor's office was located; that she had trouble remembering to take a second daily dosage of anti-seizure

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[8]Plaintiff's Brief at 5-6. The EEOC points out that Turpin could not remember during her deposition, among other things, the year she married her first husband; the name of the hospital where she first sought emergency treatment for her seizure disorder or where she underwent various surgeries for other conditions; the name of her seizure condition, including whether she was told she had epilepsy; the name of the school her son attended in Florence, South Carolina; the full names of co-workers and supervisors with whom she worked; and the extent of her seizure problem while she was living in Salem. *Id.* at 5-6 (citations omitted).

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medication; that she forgot things two or three times a week; and that she had to write down things in order to remember them. The Court finds that this evidence does not rise to the level of a substantial limitation on Turpin's ability to think. While the Court does not intend to trivialize Turpin's memory problems, many other adults in the general population suffer from a few incidents of forgetfulness a week, and indeed must write things down in order to remember them. Thus, forgetting things twice or thrice on a weekly basis is not a substantial limitation on one's ability to think, concentrate, or remember things. Neither is one episode of forgetting where the doctor's office is located. Furthermore, any forgetfulness displayed by Turpin during her deposition questioning is not relevant because it occurred approximately two years after the relevant time period when Sara Lee offered Turpin the three options. *See Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 884 (6th Cir. 1996) (asserting that an ADA claimant must show that he had a disability a the time of the discriminatory act).[9] Accordingly, the Court finds that the evidence demonstrates that Turpin was not substantially limited in her ability to think, including its components of concentrating and remembering, during the May 1997 time period.

As to Turpin's inability to remember to take her second dose of anti-seizure medication on a daily basis, forcing her to go back to a once-per-day medication, the Court believes this inability is related to Turpin's ability to care for herself, rather than her ability to think. However, since Turpin was prescribed an alternate medication that she need only take once a day, the Court finds that Turpin was still able to care for herself by taking her medication. Thus, the fact that Turpin could not remember to take her second dosage does not rise to the level of

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[9]Moreover, Gethers testified that her condition is worse today than during the relevant time period, which further invalidates the relevancy of Turpin's deposition testimony. Gethers Depo. at 27-29.

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a substantial limitation on her ability to care for herself. The only other evidence the EEOC offers regarding Turpin's inability to care for herself is that the combined effects of her seizures and its impact on her sleeping, thinking, concentrating, and memory left her feeling tired and not desiring to do anything. However, as stated *supra*, the Court has found that Turpin's epilepsy did not substantially limit her ability to sleep and think. Accordingly, the Court finds that the EEOC failed to produce sufficient evidence from which a reasonable jury could find that Turpin's seizures substantially limited her ability to care for herself.

Finally, the Court examines the EEOC's contention that Turpin experienced an "altered consciousness" during her daytime seizures, which would interrupt all major life activities, including seeing, hearing, walking, communicating, thinking, concentrating, and caring for herself. The EEOC states that Turpin's daytime seizures rendered her completely unaware of what was happening around her, and completely non-reactive to outside stimuli. Plaintiff's Brief at 19. According to the EEOC, these daytime seizures would further leave her feeling "spaced out" for a short period of time, as she would feel dizzy, weak, nervous, and upset, and would need to go off by herself to recover.

The Court notes that while Dr. Healy believes that Turpin will suffer from these seizures for the rest of her life, he also stated that Turpin's seizures were not major motor or grand mal seizures, but were of the less severe complex partial variety. More importantly, the daytime seizures would last only a few minutes at most. Turpin Depo. at 77 (stating that daytime seizures typically lasted "a couple of minutes, probably"); *see also* Healy Depo. at 46-47 (stating that her daytime seizures lasted only a "few seconds") Furthermore, once the seizure would end, Turpin found herself able to resume whatever activity she had been performing before the seizure

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occurred. Turpin Depo. at 139; *see also* Healy Depo. at 39-40, 46-47 (stating that after the seizure abates, while Turpin may be confused or not necessarily "normal," she is "alert and awake"). Thus, although it is clear that Turpin's seizures momentarily limited her ability to engage in any activity for the few minutes that her seizure episodes endured, during the balance of Turpin's life she was fully capable of performing every major life activity. Accordingly, the Court finds that Turpin's complex partial seizure episodes were simply too temporary to constitute a substantial limitation on any major life activity. *See Todd v. Academy Corp.*, 57 F. Supp.2d 448, 453 (S.D.Tex. 1999) (holding that since the plaintiff's abilities to work, walk, and talk were only limited for the five to fifteen seconds that the light, as opposed to grand mal, seizure episodes lasted, these momentary physical limitations were not "substantial"); *Washington v. Occidental Chemical Corp.*, 24 F. Supp.2d 713, 727 (S.D.Tex. 1998) (holding that the temporary loss of awareness during sporadic seizure episodes does not constitute a substantial limitation on the major life activities of walking, speaking, seeing, and hearing).[10]

In light of the above-stated reasons, the Court holds that as a matter of law, Turpin did not suffer from a "disability" pursuant to the ADA's definition during the time period surrounding May 31, 1997. Thus, the EEOC has failed to satisfy the initial element of proving its *prima facie* case. However, for the sake of completing the analysis, the Court will proceed to analyze the remaining issues in dispute in this case.

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[10]While the EEOC points to other courts that have held that an individual with epilepsy who suffers from seizures rendering him or her unconscious is substantially limited in a major life activity, neither the Fourth Circuit nor the United States Supreme Court has held that this constitutes a *per se* rule. *See* Plaintiff's Brief at 17-18 (citing cases). Moreover, this Court is not bound by any of the decisions cited by the EEOC, as the ADA demands an individualized, case-by-case inquiry.

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### B. Reasonable Accommodation Claims

### 1. Assuming that Turpin Was Disabled, Did Sara Lee Discriminate Against Turpin by Failing to Offer Her a Reasonable Accommodation?

The EEOC charges that Sara Lee violated the ADA by "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an . . . employee . . ." 42 U.S.C. § 12112(b)(5)(A). "Reasonable accommodations" may include

> job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(9)(B). The EEOC contends that Sara Lee violated the ADA's reasonable accommodation requirement by failing to modify its seniority policy[11] of permitting displaced employees from closed-down plants to bump employees with less seniority at another facility, and thereby failing to allow Turpin to remain on first shift.

In essence, the EEOC is arguing that it would have been a reasonable accommodation for Sara Lee to make an exception to its seniority policy by allowing Turpin to remain on first shift, despite its seniority policy's mandate that a more senior employee should bump her to second or third shift.[12] The Court, however, does not agree that the ADA's reasonable

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[11]The Court notes that the EEOC does not contend that the provisions of Sara Lee's seniority policy discriminate against disabled employees. Thus, the seniority policy is bona fide and legitimate.

[12]The EEOC points out that Turpin handed in a doctor's letter supporting her request to remain on first shift, in which Dr. Ducker explained that "it is a well known fact that recurrent seizure activity can be precipitated by disturbance of sleep pattern." The EEOC further asserts that both Dr. Ducker and Dr. Healy testified that, in their reasonable medical

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accommodation provision requires an employer to exempt an employee from its seniority policy to the detriment of another employee.

The ADA's statutory language provides little guidance. While it states that reasonable accommodation "may include . . . reassignment to a vacant position," 42 U.S.C. § 12111(9)(B), it is mum regarding a seniority policy's effect on whether a position is actually "vacant." When contrasted with Congress's explicit permission in Title VII of the Civil Rights Act for employers to treat employees differently pursuant to a "bona fide seniority or merit system," 42 U.S.C. § 2000e-2(h), one may argue that "this silence becomes conspicuous . . . suggest[ing] that Congress did not intend for a seniority system to trump reasonable accommodation of a disabled employee." *Barnett v. U.S. Air, Inc.*, 196 F.3d 979, 989 (9th Cir. 1999). However, the history of the Rehabilitation Act, upon which many of the ADA's provisions were based, rebuts this conclusion. *See id.* While the Rehabilitation Act does not explicitly allude to seniority systems, federal courts have almost uniformly held that reasonable accommodation under the Rehabilitation Act does not require employers to encroach on other employees' seniority rights. *Id.* (citing *Mason v. Frank*, 32 F.3d 315, 319-20 (8th Cir. 1994); *Shea v. Tisch*, 870 F.2d 786, 789-90 (1st Cir. 1989)); *see also Carter v. Tisch*, 822 F.2d 465, 467 (4th Cir. 1987) (asserting that reasonable accommodation under the Rehabilitation Act does not include reassigning the plaintiff to a light-duty position, when the reassignment would have infringed upon other employees' rights under a collective bargaining agreement). Courts often use Rehabilitation Act reasonable accommodation cases to interpret the contours of reasonable accommodation under

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opinions, a change to second or third shift would have adversely affected or exacerbated Turpin's seizure condition. Dr. Ducker Depo. at 18; Dr. Healy Depo. at 42-43.

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the ADA. *Barnett*, 196 F.3d at 990. Furthermore, "Congress specified in the ADA that enforcement agencies were to ensure that standards under the ADA and Rehabilitation Act are not inconsistent or conflicting." *Id.*

Since the ADA's legislative history is also ambiguous, *see id.*, the Court is persuaded by the holdings in numerous federal courts that the ADA should not be construed as a mandatory preference statute for disabled employees. *See, e.g., Malabarba v. Chicago Tribune Co.*, 149 F.3d 690, 700 (7th Cir. 1998); *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 810 (5th Cir. 1997). Since the EEOC concedes that, under the terms of Sara Lee's seniority policy, Turpin had no right to remain on first shift, transforming the ADA from an equalizing to a mandatory preference statute is exactly what the EEOC is requesting the Court to do in this case. The EEOC, however, urges the Court to distinguish Turpin's case from the many ADA cases holding that reasonable accommodation does not require modifying a collectively-bargained-for seniority policy, *see, e.g., Kralick v. Durbin*, 130 F.3d 76, 83 (3d Cir. 1997) ("[A]n accommodation to one employee which violates the seniority rights of other employees in a collective bargaining agreement simply is not reasonable."); *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 810 (5th Cir. 1997); *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041, 1051 ( 7th Cir. 1996); *Benson v. Northwest Airlines*, 62 F.3d 1108, 1114 (8th Cir. 1995); *Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1125 (10th Cir. 1995), because Sara Lee's seniority system did not result from collective bargaining. However, the Court finds this distinction to be of no avail. *See Barnett*, 196 F.3d at 990-91 (finding same); *Foreman*, 117 F.3d at 810 (stating in dicta that its holding, namely that the employer was not required to violate its collectively-bargained-for seniority policy in order to accommodate plaintiff under the ADA, would be the same even if the policy was not the result

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of collective bargaining). As the Seventh Circuit has stated,

> While Congress enacted the ADA to establish a "level playing field" for our nation's disabled workers, it did not do so in the name of discriminating against persons free from disability. Restated, the ADA does not mandate a policy of "affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled."

*Malabarba*, 149 F.3d at 700 (quoting *Daugherty v. City of El Paso*, 56 F.3d 695, 700 (5th Cir. 1995)).

Because the accommodation sought by Turpin would have required Sara Lee to give preference to Turpin and her disability over another employee and her seniority rights by placing the less-senior Turpin on "equal" footing with a more-senior employee, such requested accommodation was not reasonable, as it "would convert a nondiscrimination statute into a mandatory preference statute, a result which would be both inconsistent with the nondiscriminatory aims of the ADA and an unreasonable imposition on the employers and coworkers of disabled employees." *Dalton v. Subaru-Isuzu Automotive, Inc.*, 141 F.3d 667, 679 (7th Cir. 1998). Thus, it is clear that the ADA requires nothing more than that employers treat disabled and non-disabled employees equally with respect to personnel decisions. The Court accordingly holds that because the EEOC's proposed accommodation for Turpin would violate another employee's rights pursuant to Sara Lee's seniority policy by keeping that other employee from working the first shift, the proposed accommodation is not reasonable under the ADA. *See Barnett*, 196 F.3d at 991 (holding same); *Newman v. Silver Cross Hospital*, 1998 WL 409407, * 5(N.D.Ill. July 16, 1998) (holding that since the employer could not place the plaintiff on first shift without displacing another employee with greater credentials and seniority, such an

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accommodation was not required under the ADA).[13]

## 2. Did Sara Lee Violate the ADA by Failing to Engage in an Interactive Process to Find Turpin a Reasonable Accommodation?

The EEOC maintains that Sara Lee violated the ADA by failing to engage in an interactive process to determine an effective reasonable accommodation for Turpin. The ADA regulations state that:

> To determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the [employee] in need of accommodation. This process should identify the precise limitations resulting from the disability and the potential reasonable accommodations that could overcome those limitations.

*Taylor v. Phoenixville School District*, 184 F.3d 296, 311 (3d Cir. 1999) (quoting 29 C.F.R. § 1630.2(o)(3)). Thus, several circuit courts have taken the view that "both parties have a duty to assist in the search for appropriate reasonable accommodation and to act in good faith." *Id.*; *see, e.g., Beck v. University of Wisconsin Bd. Of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996) ("A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith."); *Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155, 165 (5th Cir. 1996) ("The employee's initial

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[13]The EEOC also argues that, pursuant to its Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, March 1, 1999, Sara Lee should have modified its seniority policy to accommodate Turpin. However, the Court is not bound by the EEOC's Enforcement Guidance, as this guidance does not even rise to the level of a regulation. Moreover, applied to the facts of this case, the Enforcement Guidance's requirement for Sara Lee to modify its seniority policy flatly contradicts the ADA's statutory provision providing that disabled employees need only be reassigned to *vacant* positions. 42 U.S.C. § 12111(9)(B). Thus, under the facts of this case, the Enforcement Guidance does not seem to be a reasonable interpretation of the ADA, and the Court accordingly declines to follow it.

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request for an accommodation . . . triggers the employer's obligation to participate in the interactive process . . .").

However, the Eleventh Circuit has stated that "[n]o language in the ADA mandates a pre-termination investigation," and has refused to hold that the ADA provides a cause of action for "failure to investigate" possible accommodations. *Willis v. Conopco, Inc.*, 108 F.3d 282, 285 (11th Cir. 1997). The Court tends to agree with this holding based on the following rationale offered by the *Willis* Court:

> A contrary holding would mean that an employee has an ADA cause even though there was no possible way for the employer to accommodate the employee's disability. Stated differently: An employer would be liable for not investigating even though an investigation would have been fruitless. We are confident that although the ADA does not mandate a pretermination investigation, the possibility of an ADA lawsuit will, as a matter of practice, compel most employers to undertake such an investigation before terminating a disabled employee . . . The ADA, as far as we are aware, is not intended to punish employers for behaving callously if, in fact, no accommodation for the employee's disability could reasonably have been made.

*Id.* (citation omitted).

Nevertheless, the Court notes that even if the EEOC could bring a cause of action against Sara Lee, it would still be precluded by summary judgment because Sara Lee engaged in a good faith effort to find an accommodation for Turpin. *See Taylor*, 184 F.3d at 317 ("All the interactive process requires is that employers make a good-faith effort to seek accommodations."). Employers can exhibit their good faith, for example, by "show[ing] some sign of having considered the employee's request, and offer[ing] and discuss[ing] available alternatives when the request is too burdensome." *Id.* In this case, Turpin's supervisors discussed Turpin's doctor's letter with their own doctor, Dr. Egnatz, who concluded that if

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Turpin was placed on a regular, non-rotating shift, her epilepsy would be accommodated.

Moreover, Dr. Healy's deposition testimony and office notes seem to accord with Dr. Egnatz's proposed accommodation. Dr. Healy states at one point in his deposition testimony that he was under the impression that Turpin was working rotating shifts, and that the lack of a regular shift was bothering her. Healy Depo. at 27-28 (stating that "I remember her telling me that she had to work different shifts . . . and I thought it could be a problem . . ." and "I think only that they wanted her to rotate shifts"). Such testimony supports Dr. Egnatz's opinion that to accommodate Turpin, Sara Lee needed to place her only on a regular and non-rotating shift, not first shift. While Dr. Healy states in his office notes dated March 24, 1998, that the optimal situation for Turpin would be to work first shift and to sleep at night "because the best sleep that there is is the sleep that you get before midnight," he also states that "[r]egular and sufficient sleep is important for a seizure patient." Thus, Dr. Healy seems to agree with Dr. Egnatz that working a constant shift, whether it was the first, second, or third shift, would be a reasonable (albeit not an ideal) accommodation because a non-rotating shift offers the opportunity for regular sleep. Of course, the ADA does not require Sara Lee to offer Turpin an ideal accommodation, but only a reasonable accommodation.

Turpin's supervisors accordingly offered Turpin the opportunity to work a non-rotating second or third shift, in lieu of her proposed accommodation which would have usurped the seniority rights of another employee. Under these facts, the Court finds that Sara Lee engaged in a good-faith effort to accommodate Turpin, and indeed offered her a reasonable

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accommodation, which she declined.[14] Indeed, if any party is guilty of breaking off the interactive process it was Turpin, who could have at least attempted to adjust her body to a new (and regular) sleeping pattern under the second or third shift. Accordingly, the EEOC would be precluded from bringing a cause of action based on an alleged failure by Sara Lee to engage in the interactive process.

## IV. CONCLUSION

It is, therefore,

**ORDERED,** for the foregoing reasons that Defendant's motion for summary judgment is **GRANTED**, and this matter is accordingly **DISMISSED**.

**AND IT IS SO ORDERED.**

**PATRICK MICHAEL DUFFY**
**UNITED STATES DISTRICT JUDGE**

Charleston, South Carolina
February 23, 2000

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[14]It is irrelevant that Sara Lee's offer to Turpin to work second or third shift was a right that Turpin was entitled to under the seniority plan, for, had the Court found that she suffered from a disability, this entitlement would have reasonably accommodated her.