IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff

v.

VON HOFFMANN GRAPHICS, INC.,
Defendant

Civil No. AMD 01-2187

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MEMORANDUM

Plaintiff Equal Employment Opportunity Commission ("EEOC") has brought this action on behalf of Eddie Griffith, a hearing impaired former employee of defendant Von Hoffmann Graphics, Incorporated ("Von Hoffmann"). The EEOC alleges that Von Hoffmann failed to afford Griffith reasonable accommodation and thereby violated the Americans with Disabilities Act of 1990 ("ADA"), as amended, 42 U.S.C. § 12112(a) and (b)(5)(A). The EEOC seeks injunctive relief as well as back-pay, reinstatement, and compensatory and punitive damages. The EEOC is expressly authorized under 42 U.S.C. § 12117(a) and 42 U.S.C. § 2000e-5(f)(1) to bring suit.

Now pending are the parties' cross-motions for summary judgment. A hearing was held on December 20, 2002. I have considered the parties' arguments, memoranda, and exhibits. For the reasons stated below, I shall grant Von Hoffmann's motion in part and deny it in part, and I shall deny the EEOC's motion.

I.

Pursuant to Fed. R. Civ. P. 56(c), summary judgment is appropriate "if the pleadings,

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depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). A fact is material for purposes of summary judgment, if when applied to the substantive law, it affects the outcome of the litigation. *Id.* at 248. Summary judgment is also appropriate when a party "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 Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

A party opposing a properly supported motion for summary judgment bears the burden of establishing the existence of a genuine issue of material fact. *Anderson*, 477 U.S. at 248-49. "When a motion for summary judgment is made and supported as provided in [Rule 56], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavit or as otherwise provided in [Rule 56] must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). *See Celotex Corp.*, 477 U.S. at 324; *Anderson*, 477 U.S. at 252; *Shealy v. Winston*, 929 F.2d 1009, 1012 (4th Cir. 1991). Of course, the facts, as well as the justifiable inferences to be drawn therefrom, must be viewed in the light most favorable to the nonmoving party. *See Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986). The court, however, has an affirmative obligation to prevent factually unsupported claims and defenses from proceeding to trial. *See Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987).

When both parties file motions for summary judgment, as here, the court applies the same standards of review. *Taft Broadcasting Co. v. United States*, 929 F.2d 240, 248 (6th Cir. 1991); *ITCO Corp. v. Michelin Tire Corp.*, 722 F.2d 42, 45 n.3 (4th Cir. 1983) ("The court is not permitted to resolve genuine issues of material facts on a motion for summary judgment--even where . . . both parties have filed cross motions for summary judgment") (emphasis omitted). The role of the court is to "rule on each party's motion on an individual and separate basis, determining, in each case, whether a judgment may be entered in accordance with the Rule 56 standard." *Towne Mgmt. Corp. v. Hartford Acc. and Indem. Co.*, 627 F. Supp. 170, 172 (D. Md. 1985) (quoting Charles A.Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil 2d § 2720 (2d ed. 1993)). *See also Fed. Sav. and Loan Ins. Corp. v. Heidrick*, 774 F. Supp. 352, 356 (D. Md. 1991). "[C]ross-motions for summary judgment do not automatically empower the court to dispense with the determination whether questions of material fact exist." *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 349 (7th Cir. 1983). "Rather, the court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987). Both motions may be denied. *See Shook v. United States*, 713 F.2d 662, 665 (11th Cir. 1983).

"[B]y the filing of a motion [for summary judgment] a party concedes that no issue of fact exists under the theory he is advancing, but he does not thereby so concede that no issues remain in the event his adversary's theory is adopted." *Nafco Oil and Gas, Inc. v.*

Appleman, 380 F.2d 323, 325 (10th Cir. 1967). *See also McKenzie v. Sawyer*, 684 F.2d 62, 68 n.3 (D.C. Cir. 1982) ("neither party waives the right to a full trial on the merits by filing its own motion"). However, when cross-motions for summary judgment demonstrate a basic agreement concerning what legal theories and material facts are dispositive, they "may be probative of the non-existence of a factual dispute." *Shook*, 713 F.2d at 665.

II.

Griffith is 41 years old and has been profoundly deaf since birth; he is unable to hear any sounds and incapable of intelligible speech. *Plaintiff's Motion for Partial Summary Judgment ("Plaintiff's Motion")* at 1. Griffith communicates using American Sign Language ("ASL") and has completed high school. *Plaintiff's Motion* at 1-2. Von Hoffmann is a commercial printing company that prints and binds books for various customers. *Plaintiff's Motion* at 1. There are two departments within Von Hoffmann: a Bindery Department and a Maintenance Department. *Defendant's Motion for Summary Judgment ("Defendant's Motion")* at 2. Griffith began working for Von Hoffmann through a temporary agency and eventually became a full-time, permanent employee in the Bindery Department doing bundling and shipping work. *Plaintiff's Motion* at 1, 3; *Defendant's Motion* at 3. Griffith remained in the Bindery Department until 1994. *Plaintiff's Motion* at 5; *Defendant's Motion* at 4. It appears that Griffith had a good working relationship with his supervisor in the Bindery Department, Claude Colley, and they were able to communicate effectively using gestures, some sign language, and passing written notes. *Plaintiff's Motion* at 4; *Plaintiff's Exhibit ("PX")* 3 (Griffith Depo. at 79-81, 89-90). Defendant contends that Griffith never

requested that interpreters be present during the performance appraisals he received while working under Colley's supervision, *Defendant's Motion* at 4, and Griffith acknowledges that he was treated fairly in the appraisals. *Defendant's Attachment's ("DA")* 1 (Griffith Depo. at 87-88).

Griffith was transferred to the Maintenance Department in March 1994. *Plaintiff's Motion* at 5. The Maintenance Department is responsible for maintaining equipment throughout the printing facility. *Defendant's Motion* at 2; *PX* 3 (Griffith Depo. at 100). Griffith's duties were more technical and mechanical in nature in the Maintenance Department; he was responsible for painting and maintaining the presses. *Plaintiff's Motion* at 5; PX 3 (Griffith Depo. at 98). Griffith's supervisor during his first year in the Maintenance Department was Jimmy Pearl. *Id.* Pearl indicates in his deposition, and Griffith agrees, that he made an effort to communicate with Griffith by using signs and gestures. *Plaintiff's Motion* at 5; *PX* 16 (Pearl Depo. at 26-27). Pearl also provided Griffith with an opportunity to observe and assist machinists and technicians in their jobs. *PX* 16 (Pearl Depo. at 62, 98). While under Pearl's supervision, however, there was at least one occasion, during a "Bearings and Seals" class, when Griffith requested but was not provided with a sign language interpreter. *Plaintiff's Motion* at 7; *Defendant's Motion* at 19. Griffith was ultimately unable to attend the "Bearings and Seals" class because management determined that the cost to have an interpreter present was too expensive. *Plaintiff's Motion* at 7; PX 19 (Fuhrmann Depo. at 112-16). No interpreters were present during the performance appraisals Griffith received while working under Pearl. *Defendant's Motion*

at 5. Griffith acknowledges that, although there was some trouble communicating, "it wasn't horrendous," and he and Pearl "[got] along fine." *DA* 1 (Griffith Depo. at 114-15).

In March 1995, Griffith began working under Ron Leisinger in the Maintenance Department. *Plaintiff's Motion* at 7. Leisinger did not have training or experience working with the hearing impaired and was not able to communicate with Griffith using sign language. *PX* 7 (Leisinger Depo. at 10-11). When Leisinger did communicate with Griffith, he usually did so through short written notes. *DA* 7 (Leisinger Depo. at 48-51). When there were misunderstandings between Leisinger and Griffith, Leisinger would attempt to explain in other ways or physically show Griffith what he was trying to communicate. *DA* 7 (Leisinger Depo. at 51-53). Griffith testified that his job duties changed noticeably under Leisinger's supervision. *PX* 3 (Griffith Depo. at 131, 133). Griffith asserts that he was removed from technical and mechanical assignments and re-assigned to "gopher" tasks for his co-workers; to clean up behind other workers; and to paint and refurbish waste removal systems and piping on the roof. *Plaintiff's Motion* at 8; *PX* 3 (Griffith Depo. at 131, 133, 139). Griffith also requested that he be formally certified to operate a forklift. *Plaintiff's Motion* at 10; *PX* 3 (Griffith Depo. 249-50). Despite the fact that Griffith alleges that operating the forklift was a part of his regular duties, *PX* 3 (Griffith Depo. 257, 260-62), he was never certified to operate a forklift consistent with Von Hoffmann policy. *Plaintiff's Motion* at 10; *PX* 23 (Policy). Von Hoffmann provided Griffith, as well as another deaf employee, with an interpreter in October 1999, for the forklift training, but Griffith was not scheduled to work on that day. *Defendant's Motion* at 18; *Plaintiff's Motion* at 11.

The nub of the dispute in this case is over the continuing misunderstandings between Leisinger and Griffith, and the former's repeated reprimands of the latter, over Griffith allegedly "standing around" on the job. The two men communicated primarily through short notes or through other employees. *Plaintiff's Motion* at 13-14; *PX* 3 (Griffith Depo. at 159). Griffith indicates that he attempted to explain to Leisinger during one of his performance appraisals that he was not actually "standing around" and "doing nothing" as Leisinger frequently alleged, but that he was learning by watching other employees work because he did not have the benefit of hearing and working at the same time. *Plaintiff's Motion* at 14. Von Hoffmann counters that the reprimands were "justified," *Defendant's Motion* at 23, and Griffith was continually warned about "not performing his job and about loafing on the job." *Id.* at 24. In October 1999, Leisinger believed that Griffith was again "loafing on the job" and he issued a reprimand to Griffith for "not staying busy." *PX* 3 (Griffith Depo. at 189-90); *PX* 25 (Reprimand). Griffith signed the reprimand acknowledging his understanding, but no interpreter was provided. *PX* 3 (Griffith Depo. 192); *PX* 7 (Leisinger Depo. 212-15).

In March 2000, Griffith and Leisinger agreed that Griffith would be transferred to the third shift, thereby becoming eligible for an $.80 per hour raise. *Plaintiff's Motion* at 14; *Defendant's Motion* at 11-12. Griffith spoke with his wife and rearranged the family's schedule to accommodate the new shift hours. *Id.*; *PX* 3 (Griffith Depo. at 312). Leisinger rescinded his permission for Griffith to transfer to the third shift a month later, in April 2000, after Leisinger issued another reprimand, concluding that Griffith was not "staying busy," was "standing around too much," and could not be trusted to stay busy on the third shift

where there was less supervision. *Plaintiff's Motion* at 15; *Defendant's Motion* at 12; *PX* 27 (Reprimand). Griffith did not have an interpreter present when he received this reprimand. *PX* 7 (Leisinger Depo. at 229-30). Leisinger and Griffith passed short written notes back and forth where Griffith attempted to explain, again, that he was not simply "standing around," but was attempting to gain on-the-job knowledge. *PX* 4, 27 (Griffith affidavit, Note). Leisinger ultimately wrote that he did not "know what else to do," and that Griffith just did not "seem to understand." *PX* 27 (Reprimand). Griffith, having by now become immeasurably frustrated by his inability to communicate to Leisinger that he "learned by watching," wrote "I'm quit," and thereby told Leisinger on April 4, 2000, that he was resigning from the company. *Plaintiff's Motion* at 16; *PX* 27 (Note). Griffith subsequently filed a claim for employment discrimination with the EEOC.

III.

A.

Von Hoffmann first argues that the EEOC failed to conciliate in good faith as required by 42 U.S.C § 2000e(5). The resolution process under the ADA for a claim of discrimination includes, *inter alia*, an EEOC investigation, a determination of reasonable cause to believe that the charge is true, and engaging in conference, conciliation, and persuasion with the employer to eliminate any unlawful practices. 42 U.S.C § 2000e-5(b); *EEOC v. Am. Nat'l Bank*, 652 F.2d 1176, 1185 (4th Cir. 1981) (race discrimination claim). If, "within thirty days after a charge [of discrimination] is filed with the [EEOC]," the EEOC is "unable to secure from the [employer] a conciliation agreement acceptable to the [EEOC], the [EEOC]

may bring a civil action." 42 U.S.C § 2000e-5(f)(1). Von Hoffmann argues that bringing suit before attempting good faith conciliation is premature. *See EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979) (race discrimination claim); *Patterson v. Am. Tobacco Co.*, 535 F.2d 257, 272 (4th Cir. 1976) (race and sex discrimination claims). The EEOC asserts that it made a good faith conciliation effort and counters that judicial scrutiny of the conciliation process has been limited so long as a good faith effort to conciliate is made by the EEOC. *See EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1101-02 (6th Cir. 1984) (sex discrimination claim); *Radiator Specialty Co.*, 610 F.2d at 183.

Indisputably, the parties exchanged correspondence after Griffith filed his Discrimination Charge with the EEOC on May 31, 2000; Von Hoffmann provided a formal Statement of Position. On August 23, 2000, after requesting information and documents to assist in its investigation, the EEOC issued a Reasonable Cause Determination ("Determination"), concluding that Von Hoffmann had violated the ADA by denying Griffith reasonable accommodations, training, and had constructively discharged him based on his disability. A proposed conciliation agreement was forwarded with the Determination. On September 8, 2000, Von Hoffmann submitted a counterproposal. On September 20, 2000, the EEOC notified Von Hoffmann that efforts to conciliate had been unsuccessful and that the case would be referred to the EEOC legal unit.

The issue presented is whether the EEOC engaged in good faith conciliation efforts and whether the efforts lasted for thirty days. Title 42 U.S.C § 2000e-5(b) and (f)(1) does not mandate specifics as to how the EEOC should engage in conciliation. *Keco Indus., Inc.*,

748 F.2d at 1102 (stating that once the district court determines whether conciliation was attempted, the form and substance of such conciliation is within the discretion of the EEOC and is beyond judicial review); *see EEOC v. Wayside World Corp.*, 646 F. Supp. 86, 89 (W.D. Va. 1986) (noting that substantial deference should be given to EEOC's determination that conciliation efforts had failed after forty-five days). Instead, the statute simply mandates that the EEOC engage in conciliation. In the August 23, 2000, letter, the EEOC initiated conciliation discussions by advising Von Hoffmann that it was seeking back wages, compensatory and punitive damages, and non-monetary relief for Griffith. In its response, Von Hoffmann agreed to minimal back pay, continued to "expressly deny all allegations of discrimination," and indicated that it would not pay compensatory or punitive damages. The EEOC quickly determined that, based on Von Hoffmann's refusal to provide full relief as requested and its offer to provide only a "negligible amount," further conciliation would be unproductive.

Although it would have been reasonable (and perhaps even desirable) for the EEOC to pursue conciliation more aggressively than it did in this instance, as a matter of law there was indeed a good faith effort at conciliation here. The EEOC was not unreasonable, even assuming the standard of review is that low (and it is not), in concluding that further conciliation efforts would be unproductive. And, although it appears that the EEOC terminated conciliation efforts approximately three days prior to the 30 period mandated by 42 U.S.C § 2000e-5(f)(1), no evidence has been presented to suggest that Von Hoffmann would have sufficiently changed its position in three days to meet the EEOC's proposal for

full relief. *See Wayside World Corp.*, 646 F. Supp. at 89. Accordingly, because the EEOC's determination that conciliation had failed was made in good faith, based on Von Hoffmann's explicit rejection of liability and negligible counter-proposal, Von Hoffman's complaints about the process are unavailing.

B.

Von Hoffmann next argues that it provided Griffith with reasonable accommodations during company meetings, training, and during disciplinary actions, or was unaware that Griffith needed an accommodation because Griffith failed to request one. Under the ADA, a qualified individual with a disability is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8); *see Bissell v. Reno*, 74 F. Supp. 2d 521, 527 (D. Md. 1999) (Rehabilitation Act claim). An employer is obligated to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless such covered entity can demonstrate that the accommodation would pose an undue hardship on the operation of the business of such covered entity . . ." 42 U.S.C. § 112112(5)(A). In order to establish employment discrimination based on a disability, the EEOC must prove that Griffith (1) is disabled; (2) Von Hoffmann knew of his disability; (3) with the accommodation, he could perform the essential functions of his job; and (4) Von Hoffmann refused to make such accommodations. *Doe v. Univ. of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1265 (4th Cir. 1995); *see Estate of Ellen Alcalde v. Deaton Specialty Hosp. Home, Inc.*, 133 F. Supp. 2d 702, 707 (D. Md. 2001).

The parties agree that (1) Griffith's profound deafness is a disability under the ADA, and (2) Von Hoffmann knew of Griffith's disability. The parties also appear to agree that, with reasonable accommodation, Griffith was able to perform the essential functions of his job in both the Bindery and Maintenance Departments. Accordingly, the only element as to which there is disagreement is whether Von Hoffmann refused to reasonably accommodate Griffith.

1.

Von Hoffmann contends that Griffith requested and was provided with a sign language interpreter for all *formal plant-wide* meetings throughout the course of his employment. The EEOC does not dispute that Griffith was provided with sign language interpreters at most, if not all, plant-wide staff meetings; the record identifies approximately 26 occasions between 1991 and 2000 when Griffith was provided with a sign language interpreter. Nevertheless, the EEOC alleges that Griffith's supervisor, Leisinger, held numerous *department-wide* meetings, during which, Griffith requested but was not provided with a sign language interpreter. Von Hoffmann asserts that Leisinger never held any formal, scheduled meetings where Maintenance employees' attendance was mandatory, and any "impromptu discussions" that may have occurred did not pertain to Griffith's position. Griffith maintains that (1) these meetings did occur frequently, and (2) he could not determine exactly what was relevant to his position or employee interests because there was no sign language interpreter provided even after his repeated requests. In view of this state of the record, it is manifest that genuine disputes of material facts exist as to whether (1)

formal department-wide meetings occurred; (2) the information was relevant to Griffith's position; (3) Griffith requested an interpreter for these meetings; and (4) Von Hoffmann denied Griffith's requests for accommodation.

2.

The EEOC also alleges that Von Hoffmann failed to provide Griffith with an interpreter for forklift operation certification and a Bearings and Seals class (maintenance techniques). Von Hoffmann asserts that: (1) the EEOC claim regarding the Bearings and Seals class is time-barred because it was filed more than 180 days after the incident occurred, *see* 42 U.S.C. 2000e-5(e); (2) there is no evidence that any other employee took the Bearings and Seals class; (3) Griffith was provided with appropriate forklift training given that operating a forklift was a minor part of his job; and (4) Griffith's other claims that he was denied on-the-job training are more appropriately characterized as disparate treatment claims.

Von Hoffmann required that all employees using a forklift be certified, *PX* 23 (Certification Policy), after the Occupational Safety and Health Administration ("OSHA") mandated that all forklift operators be certified in 1999. The EEOC alleges that Von Hoffmann refused to provide Griffith with a sign language interpreter to enable him to attend the forklift certification class because Von Hoffmann did not want the legal responsibility that might come with licensing a deaf employee. Von Hoffmann counters that forklift operation was a minor part of Griffith's responsibilities and, to the extent that Griffith used the forklift, his supervisors and co-workers trained him by demonstrating forklift operations and explaining a training manual in detail. The EEOC asserts that employees whose

responsibilities did not include regularly operating a forklift received forklift training and certification.

The ADA does not impose upon an employer the general duty to provide an unrequested accommodation. *See, e.g., Butler v. Dept. of the Navy*, 595 F. Supp. 1063, 1068 (D. Md. 1984) (Rehabilitation Act claim. Instead, once an accommodation for a known disability has been requested, an employer has the ultimate discretion to choose between effective accommodations, and may choose the accommodation that is easier for it to provide. 29 C.F.R. § 1630.9, Appendix III; *Bryant v. Better Bus. Bureau of Greater Md., Inc.*, 923 F. Supp. 720, 741 (D. Md. 1996); *see also Scott v. Montgomery County Gov't*, 164 F. Supp. 2d 502, 508-09 (D. Md. 2001). Although Von Hoffmann argues that the accommodation it allegedly provided was reasonable, it does not meet OSHA's 1999 mandate that all forklift operators be certified. Even though Von Hoffmann alleges that it attempted to certify Griffith (along with another deaf employee) with an interpreter in October 1999, and Griffith failed to come to work on that day, Griffith remained uncertified but continued to operate the forklift. Plainly, genuine disputes of material fact surround the allegation that Defendant culpably failed to permit Griffith to obtain forklift certification.

3.

Finally, the EEOC alleges that Von Hoffmann failed to provide a reasonable accommodation to Griffith when it failed to provide a sign language interpreter during two disciplinary meetings, one on October 18, 1999, and one on April 4, 2000. Von Hoffmann counters that it reasonably accommodated Griffith by using written notes and alleges that

Griffith did not request any other accommodation. Although the EEOC maintains that the written notes were an unreasonable accommodation given Griffith's limited written English skills, Von Hoffmann alleges that Griffith never communicated that he had difficulty understanding written English and used written notes frequently over the course of his employment. Von Hoffmann alleges that "Griffith always understood what was being communicated to him during his reviews and did not request that an interpreter be provided." The EEOC explains that Griffith was not able to sufficiently defend himself during the disciplinary meetings because he was without an interpreter and could not fully understand what was occurring using the written notes because his reading comprehension level is estimated to be at a third or fourth grade level. Again, viewing the facts in a light most favorable to the non-movant, respectively, there are material disputes of fact as to the need for, and Defendant's knowledge thereof (actual or constructive), reasonable accommodation.

C.

The EEOC also alleges that Griffith was constructively discharged when Von Hoffmann rescinded its offer to move Griffith to the third shift. Von Hoffmann counters that Griffith voluntarily quit his position once he learned that he would not be moved to the third shift. Constructive discharge occurs "when an employer deliberately makes an employee's working conditions intolerable and thereby forces him to quit his job." *Nye v. Roberts*, 159 F. Supp. 2d 207, 214 (D. Md. 2001) (internal quotation marks omitted) (Title VII sexual harassment claim) (quoting *Holsey v. Armour & Co.*, 743 F.2d 199, 209 (4th Cir. 1984) (racial discrimination claim)). A plaintiff must prove (1) deliberateness of the employer's

action and (2) intolerability of working conditions. *Id.* (citing *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985) (age discrimination claim). "Although . . . [the Fourth Circuit] requires proof of the employer's specific intent to force an employee to leave, intent can be inferred from circumstantial evidence." *Id.* (citing *Bristow*, 770 F.2d at 1255). "Whether a plaintiff's working conditions were intolerable is assessed by the objective standard of whether a reasonable person in the plaintiff's position would have felt compelled to resign." *Taylor v. Virginia Union University*, 193 F.3d 219, 237 (4th Cir.1999) (alleging Title VII sex discrimination violation), *cert. denied*, 528 U.S. 1189 (2000). The Fourth Circuit has held that "dissatisfaction with work assignments, a feeling of being unfairly criticized, or difficult or unpleasant working conditions are not so intolerable as to compel a reasonable person to resign." *Id.* (internal quotation marks omitted) (quoting *Carter v. Ball*, 33 F.3d 450, 459 (4th Cir. 1994) (race discrimination claim).

As support for the constructive discharge claim here, the EEOC alleges that (1) Griffith's supervisor, Leisinger, ignored and avoided him; (2) Griffith's attempts to participate in department-wide meetings and receive forklift certification were futile; (3) Griffith was "chronically frustrated" by his inability to communicate and his employers inability to understand his concerns; and (4) Griffith was confused when his transfer was rescinded for "standing around" after repeated attempts to explain that he could only learn by watching if no interpreter was present. The EEOC also relies on the assertion that Griffith's more technical duties virtually ended when he came under Leisinger's supervision and that he was forced to perform duties that were largely janitorial in nature. Leisinger

testified that the decision to rescind the transfer was based on his inability to "trust" that Griffith would "do the work" and "not just stand around or follow the other technicians around."

Although, on a proper record, circumstantial evidence might provide adequate proof of Von Hoffmann's specific intent to force Griffith to generate a dispute of material fact, this is not such a case. *See Nye*, 159 F. Supp. 2d at 214-15 (stating that plaintiff was never asked to resign or leave, evaluation suggested a future relationship, and reprimand letter did not state that it would lead to termination, demotion, or decrease in pay) (citing *Bristow*, 770 F.2d at 1255). Apart from the EEOC's bare assertion, there simply is no probative evidence that Von Hoffmann intentionally rescinded Griffith's transfer to the third shift in an effort to force him to quit his employment. *See Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1354 (4th Cir. 1995) (stating that, in addition to the "reasonable person" standard, a plaintiff must prove that the actions complained of were intended by the employer as an effort to force the employee to quit in Title VII case alleging sexual harassment and constructive discharge); *Nye*, 159 F. Supp. 2d at 214. No evidence would reasonably permit a juror reasonably to conclude that the rescinded transfer, although based on misunderstandings because an interpreter was not present, was an intentional effort by Von Hoffmann to force Griffith to quit his employment entirety. Further, a constructive discharge claim is not governed by subjective perceptions of what an employee thinks his employer is doing or might do. *See id.* (citing *Raley v. Bd. of St. Mary's County Comm'rs*, 752 F. Supp. 1272, 1279 (D. Md. 1990) (sex discrimination claim)). Leisinger rescinded the offer, but he did not suggest or

even hint that Griffith should quit or that he expected Griffith to quit; Griffith received no decrease in his pay or material change in his then extant duties.

Thus, I need not reach the second element in the constructive discharge claim--intolerability of working conditions-- because Griffith does not establish the first element. *See Nye*, 159 F. Supp. 2d at 214 (citing *Bristow*, 770 F.2d at 1255). I note, however, that Griffith acknowledges that, aside from the communication misunderstandings, he basically enjoyed working at Von Hoffmann. Until the rescission of his shift transfer, he was frustrated, but not at all to the point of quitting. *Id.* Part of an employee's obligation to be reasonable is an obligation not to assume the worst and not to jump to conclusions too fast about a particular employment situation. *See Rankin v. Greater Media Inc.*, 28 F. Supp. 2d. 331, 341 (D. Md. 1997) (citing *Smith v. Goodyear*, 895 F.2d 467, 473 (8th Cir. 1990). In short, viewing the facts in the light most favorable to the EEOC, I conclude as a matter of law that Plaintiff cannot establish that Von Hoffmann intended to force Griffith to quit by rescinding the transfer to the third shift. Accordingly, Defendant is entitled to summary judgment as to the constructive discharge claim.

D.

Finally, the parties seem to have joined issue over some other so-called disparate treatment claims. However, as I stated during the hearing, the so-called "disparate treatment claims" are fully encompassed by the failure-to-accommodate claims discussed above. No further discussion of those claims is necessary.

IV.

For the reasons set forth above, as a matter of law, genuine disputes of material exist with regard to the EEOC's claims under the ADA, except the claim for constructive discharge. As to the constructive discharge claim, judgment shall be entered in favor of Defendant. In all other respects, the cross-motions for summary judgment shall be denied.

Filed: December 23, 2002

ANDRE M. DAVIS
UNITED STATES DISTRICT JUDGE