IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

KAISER FOUNDATION HEALTH PLAN OF GEORGIA, INC.,

Defendant.

CIVIL ACTION FILE NO.

1:19-CV-05484-AT-WEJ

**FINAL REPORT AND RECOMMENDATION**

Plaintiff, the Equal Employment Opportunity Commission ("EEOC"), filed this action against Kaiser Foundation Health Plan of Georgia, Inc. ("Kaiser") under Title I of the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. § 12101 et seq. (the "ADA"). The EEOC, which seeks relief on behalf of Kaiser employee Sharion Murphy, contends that defendant violated the ADA when it delayed by several months in accommodating Ms. Murphy's disabilities.

This matter is before the Court on the EEOC's Motion for Partial Summary Judgment [64] (as to liability only) and on Kaiser's Motion for Summary Judgment [85]. The issue here is whether an employer's reasonable accommodation obligation extends to ingress to a facility when the disabled employee has no

problem performing the essential functions of her job. Because that question is answered in the affirmative below, the undersigned **RECOMMENDS** that Plaintiff EEOC's Motion for Partial Summary Judgment [64] as to liability be **GRANTED** and Defendant Kaiser's Motion for Summary Judgment [85] be **DENIED**.

## I. STATEMENT OF FACTS

The Court draws the following facts largely from the parties' submissions. In support of its Motion for Partial Summary Judgment, the EEOC as movant filed a Statement of Undisputed Material Facts [64-2] ("PSUMF"). See N.D. Ga. Civ. R. 56.1(B)(1).[1] As required by Local Rule 56.1(B)(2)(a), defendant submitted a response. (See Def.'s Resp. to Pl.'s Statement of Undisputed Material Facts [99-1] ("DR-PSUMF").

In support of its Motion for Summary Judgment, Kaiser as movant filed a Statement of Undisputed Material Facts [85-2] ("DSUMF"). See N.D. Ga. Civ. R. 56.1(B)(1). As required by Local Rule 56.1(B)(2)(a), plaintiff submitted a response. (See Pl. EEOC's Resp. to Def.'s Statement of Undisputed Material Facts [95-28] ("PR-DSUMF").

[1] Although the EEOC brought this action on behalf of Ms. Murphy, the parties sometimes refer to her as the plaintiff. The Court sometimes follows that convention too.

When one party admits a fact proposed by the other, the Court includes that fact as undisputed for the purposes of this Report and Recommendation and cites only that proposed fact. When a party denies a proposed fact, the Court reviews the record and determines whether that denial is supported by the record evidence cited, and if it is, whether any fact dispute is material. The Court sometimes modifies a proposed fact to better reflect the record cited. Where necessary, the Court rules on a party's objection to a proposed fact, but if the Court includes the proposed fact without discussion, then a party may assume that the objection has been considered but overruled. Given the duplication between DSUMF and PSUMF, the Court sometimes cites to one party's proposed fact and uses a see also signal to the other's proposed fact. Finally, the Court draws additional facts necessary for disposition of these Motions from its review of the record. See Fed. R. Civ. P. 56(c)(3).

### A. Plaintiff's Employment, the DCC, and Revolving Doors

Plaintiff began working with Kaiser in October 2003. From 2006 until October 2018, she worked as a Specialty Appointment Coordinator. In that role she scheduled appointments for Kaiser members who needed to see specialists instead of their primary care physicians. (DSUMF ¶ 1; see also PSUMF ¶ 1.)[2]

[2] Kaiser is engaged in interstate commerce. (PSUMF ¶ 4.) Plaintiff had the actual skills and experience necessary to perform her job of Specialty Appointment

In October 2016, Kaiser relocated many employees (including plaintiff) from a campus on Piedmont Road to its brand-new Duluth Call Center ("DCC") facility. (DSUMF ¶ 2; see also PSUMF ¶ 3.) Kaiser remodeled an existing building and replaced four non-revolving lobby doors with a combination of revolving and non-revolving doors. (PSUMF ¶ 2.) Christina Parks, as Facilities Services Project Coordinator, was in charge of facilities-related matters at the DCC. (DSUMF ¶ 3.) When the DCC first opened, because its lobby had not been finished, everyone entered through a receiving door. (Id. ¶ 4.) Kaiser's construction team told Ms. Parks that the non-revolving doors in the DCC's lobby were designated as fire exit doors that should only be used in emergency situations. (Id. ¶ 5.)

In late-2016, plaintiff was exiting through one of the revolving doors at the DCC when a male co-worker entered the same compartment, briefly trapping them both, which caused her mind to shut down and she froze; she felt like she could not breathe, she could not move, she could not hear anything, and she could not think. (PSUMF ¶ 5.) According to plaintiff, this event "triggered a situation that I had in a revolving door previously, before I started at Kaiser." (DSUMF ¶ 8.)

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Coordinator. (Id. ¶ 48.) Because plaintiff was already working in the position, she met its minimum qualifications and was considered qualified for purposes of reviewing an accommodation request. (Id. ¶ 49.)

After this incident, plaintiff began using a non-revolving door to enter and exit the DCC. However, in early-January 2017, Ms. Parks told plaintiff that she had to use the revolving doors instead of the non-revolving doors, which was a rule that applied to all DCC employees. (PSUMF ¶ 6.) Plaintiff told Ms. Parks that she had a medical issue related to using revolving doors, so Ms. Parks told her to bring in a doctor's note. (Id. ¶ 7.)[3]

**B. Dr. Crossing's Note of January 18, 2017**

Because Ms. Parks asked plaintiff for a doctor's noted, she went to see her primary care physician, Dr. Yvette Crossing, on January 18, 2017. (DSUMF ¶ 9.) Dr. Crossing diagnosed plaintiff with claustrophobia and post-traumatic stress disorder ("PTSD"). (PSUMF ¶ 8.)[4] However, the physician did not disclose the PTSD diagnosis in the note subsequently provided to Kaiser. (Crossing Dep. [82] 43.) Instead, Dr. Crossing wrote the following note:

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[3] Plaintiff was not the only employee at the DCC who had problems using a revolving door. (DSUMF ¶ 17, modified per record cited.) There was another employee briefly using a self-propelled scooter (after an injury) and another employee in a wheelchair. Security allowed both of them into the DCC through non-revolving doors. (PSUMF ¶¶ 29-30, modified per record cited.)

[4] Plaintiff testified that she manages her claustrophobia and PTSD by avoiding small or enclosed spaces, including removing the doors from her bathroom at home, avoiding an elevator if too many people are on it, and using the handicap stall in public bathrooms. (PSUMF ¶ 12.)

> Sharion A Murphy i[s] a patient of mine. She has claustrophobia and should be allowed to use the regular doors. She cannot use the revolving door [due] to her claustrophobia.

(PSUMF ¶ 9; see also DSUMF ¶ 10.)[5]

As is clear from the above-quoted note, Dr. Crossing did not state that plaintiff's claustrophobia impacted her ability to perform her job. (DSUMF ¶ 11.) Indeed, Dr. Crossing testified that she had not discussed with plaintiff whether the claustrophobia affected her ability to do her job. (Id.) However, Dr. Crossing noted that one cannot work if one cannot go through the door to get into the building. (PR-DSUMF ¶ 11.)

Plaintiff retrieved Dr. Crossing's Note on or about January 19, 2017, and provided it to her boss, Operations Supervisor Yvette Caruthers. (PSUMF ¶ 13.)[6] According to plaintiff, Ms. Caruthers directed her to fax Dr. Crossing's note to

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[5] Claustrophobia, or fear of enclosed spaces, is a mental impairment that can cause physical panic. (PSUMF ¶ 10.) It is not a condition that every person has. (Id. ¶ 11.) Dr. Crossing referred plaintiff for treatment to Dr. Alana Miller-Clayton, a behavioral health provider. (DUSMF ¶ 12.) Dr. Miller-Clayton testified that claustrophobia is not a clinical diagnosis but a specific phobia. (Id. ¶ 13.) Although Dr. Miller-Clayton testified that she did not diagnose plaintiff with a specific phobia (id.), her recollection was mistaken. In a progress note dated June 19, 2017, the doctor describes plaintiff as having a "specific phobia, enclosed spaces." (Miller-Clayton Dep. Ex. 8 [84], at 152; see also PR-DSUMF ¶ 13.) As discussed infra, plaintiff did not disclose Dr. Miller-Clayton to Kaiser until May 20, 2017.

[6] The Court excludes DSUMF ¶ 39 because it states an issue or legal conclusion. See N.D. Ga. Civ. R. 56.1(B)(1)(c).

Kaiser's National Human Resources Office. (Id. ¶ 14.) Plaintiff Declaration shows that she faxed Dr. Crossing's note, along with a number of other documents related to a request for an absence under the Family and Medical Leave Act ("FMLA"), to Kaiser's National Human Resources Office on January 28, 2017. (See Murphy Decl. [65-1] ¶ 15 & Ex. B.)

Kaiser disputes plaintiff's recollection. Defendant asserts that when plaintiff raised her need for an accommodation to use non-revolving doors with Ms. Caruthers, she gave plaintiff a Kaiser ADA Job Accommodation Form and directed her to a Kaiser website called "My HR," through which she could request an accommodation. (DR-PSUMF ¶ 14.)

### C. Ms. Parks's January 2017 Memo

On January 24, 2017, Ms. Parks sent an email to management personnel at the DCC asking them to "review and distribute" a memo she had attached to that email regarding emergency exit doors. (Parks Dep. Ex. 27 [75], at 280.) That attached memo, directed to all DCC employees from Ms. Parks and dated January 20, 2017,[7] provides as follows:

[7] The memo reflects the erroneous date of January 20, **2016**. The date could not have been correct because Ms. Parks testified that she "wasn't there" in 2016. (Parks Dep. [75] 164-65.)

> **Here is what you need to know**:
>
> Emergency exit signs have been installed on the emergency/fire doors in the lobby and these doors are to be used strictly for emergency evacuations.
>
> Use of these doors for non-emergency egress impacts the integrity of the security of the facility and also impacts how we manage the internal climate of the building.
>
> If special accommodation(s) is needed, please visit: "**MyHr, find a form, ADA Job Accommodation**", print the forms, complete & sign the forms and fax them to the secure number on the form.
>
> Should you have any questions, please feel free to contact me.

(Parks Dep. Ex. 27 [75], at 282; see also PSUMF ¶ 15; DSUMF ¶¶ 6-7.)

### D. Plaintiff Continues to Use Non-Revolving Doors

Plaintiff continued to exit the DCC using non-revolving lobby fire exit doors. (DSUMF ¶ 59.) On or about February 15, 2017, alarm bars were installed on the non-revolving lobby doors and they were locked from the outside. (PSUMF ¶ 17.) Because plaintiff could not freely use a non-revolving door to enter, each day she had to find a way to get in to the DCC, either by knocking on the door until a security guard let her in or by asking a co-worker to open the door for her from the inside. (Id. ¶ 18, modified per record cited; see also DSUMF ¶ 15.)[8] Dr. Crossing

[8] Employees using the revolving doors did not need security to let them in and did not need to show security their badges. (PSUMF ¶ 16.)

testified that security guards allowing plaintiff in through a non-revolving door did not cause an issue for her claustrophobia. (DSUMF ¶ 16, modified per record cited.)

Plaintiff was challenged every day about using a non-revolving door, including the security guards telling her that they would put her name in their security reports. (PSUMF ¶ 19; see also DR-PSUMF ¶ 19, noting that having one's name placed in a security report was not discipline.)[9] Ms. Parks received complaints from security personnel and Kaiser employees about plaintiff continuing to use non-revolving doors to enter and exit the DCC. (DSUMF ¶ 14.) Kaiser did not discipline plaintiff for continuing to do so. (Id. ¶ 60.)

On March 7, 2017, a security guard refused to open the door for plaintiff and told her that he would be written up if he did. (PSUMF ¶ 20.) Plaintiff sought to report this incident with the security guard to her supervisor (Ms. Caruthers), but when she could not find her, plaintiff went to Ms. Caruthers's supervisor, Operations Manager Clifton Hester. (Murphy Decl. [65-1] ¶ 19.) Plaintiff explained to Mr. Hester that she needed to use a non-revolving door due to a medical condition. (Id. ¶ 20.) Mr. Hester asked plaintiff if she had filled out a Job

[9] The security guards at the DCC were employed by Blackstone Consulting and were not Kaiser employees. (DSUMF ¶ 58.)

Accommodation Form; she replied that she had not been asked to do so. (PSUMF ¶ 21.)[10] Mr. Hester told plaintiff that she would need to seek an ADA accommodation using Kaiser's processes. (DSUMF ¶ 18.) Plaintiff was given the ADA Job Accommodation Form and also told to go to Kaiser's My HR platform (through which she could request an ADA accommodation). (Id. ¶ 19.) Although she had access to MyHR, plaintiff did not consult it to see what the ADA job accommodation process was. (Id. ¶ 20.)

On March 8, 2017, plaintiff called Dr. Miller-Clayton and told her that she had been feeling unstable and very stressed at her job, because she felt like she was being harassed and that she had been calling out from work because of her issues with the revolving door. (PSUMF ¶ 23.) Plaintiff and her physician decided to add an intensive outpatient group therapy to help with the stress and anxiety of continually being challenged about using a non-revolving door. (Id. ¶ 24.) The

[10] Although plaintiff claims that this was the first time she had been told that she had to fill out a Job Accommodation Form (PSUMF ¶ 22), the January 20, 2017 memo from Ms. Parks to all DCC employees contained that directive. (DR-PSUMF ¶ 22.) Kaiser also contends that Ms. Caruthers gave plaintiff the ADA Job Accommodation Form and directed her to the MyHR platform on January 19, 2017 (see id.), but as noted above, that is a disputed fact.

stress plaintiff felt because of coming through the non-revolving doors negatively impacted her ability to complete her job tasks. (DSUMF ¶ 77.)[11]

### E. Plaintiff's March 15, 2017 Accommodation Request

On March 15, 2017, plaintiff submitted (1) a Job Accommodation Form, which stated that she is "[c]laustrophobic and cannot use revolving doors" and requested to "use the regular doors," and (2) another copy of Dr. Crossing's January 18, 2017 note, to Doris Ogden, Kaiser's Work Absence Management ("WAM") Supervisor. (PSUMF ¶ 27; see also DSUMF ¶¶ 31, 33.)[12]

After receiving plaintiff's job accommodation request, Ms. Ogden emailed plaintiff on March 16, 2017 and asked her to clarify the doors to which she was referring, because Ms. Ogden wanted to be certain which doors plaintiff's manager and DCC security would need to allow plaintiff to use. (DSUMF ¶ 34.) Ms. Ogden

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[11] Kaiser's denial of plaintiff's request to use a non-revolving door made her anxiety and depression worsen, causing plaintiff to have anxiety related to going to work. (PSUMF ¶ 25.) Had plaintiff been given permission to use a non-revolving door after she first discussed this issue with Ms. Caruthers on January 19, 2017, she would not have called out of work in February and March 2017 or needed the intensive outpatient therapy (which occurred in April and May 2017). (Id. ¶ 26.)

[12] In DSUMF ¶ 32, Kaiser proposes that plaintiff did not tell Ms. Ogden what condition she had which prevented her from using revolving doors. Although Ms. Ogden may have so testified, that assertion is not accurate. The form plaintiff submitted explained that she was claustrophobic and could not use revolving doors. Ms. Ogden also had Dr. Crossing's note, which opined that plaintiff's claustrophobia prevented her from using revolving doors. (See PR-DSUMF ¶ 32.)

also asked plaintiff if she took stairs or an elevator to access the DCC's second level so that Ms. Ogden would know if plaintiff's accommodation would need to address getting to the second floor. (Id. ¶ 35.) Ms. Ogden sought these additional details because WAM endeavored to "make sure that if there is something additional that the employee may need to be accommodated in besides what that employee's requesting." (Id. ¶ 36.)[13]

Ms. Ogden testified that she does not make her own determination whether someone is disabled, but utilizes a physician's assessment. (PSUMF ¶ 28, modified per record cited.) Ms. Ogden testified as follows about Dr. Crossing's note:

> Q Just on the issue of whether Ms. Murphy has a disability, is there—is this sufficient—this letter from Dr. Crossing sufficient for—for WAM's purposes to—to know that Ms. Murphy has a disability?
>
> A It—it is—it is sufficient that she does indeed have a disability.

(Ogden Dep. of Aug. 20, 2020 Vol. I [70] 99-100, cited in PSUMF ¶ 38.) Ms. Ogden stated further that she did not question Dr. Crossing's assessment that plaintiff had claustrophobia and "absolutely" trusted it. (Id. at 37.) Ms. Ogden added, however, that Kaiser needed more information about the disability, such as whether plaintiff could perform her job duties without an accommodation. (DR-PSUMF ¶ 28.)

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[13] The Court excludes DSUMF ¶¶ 37-38 as immaterial.

### F. WAM's Role in the Accommodation Process

Kaiser's WAM department handles the company's ADA job accommodation requests. (DSUMF ¶ 21.)[14] When an employee completes and returns a Job Accommodation Request Form to WAM, it notifies the employee that medical documentation, including a completed Medical Inquiry Form, will be needed to approve the accommodation request. (Id. ¶ 22.) The Medical Inquiry Form asks the physician (1) if the employee had a disability; (2) what job functions or major life activities were affected by the disability; and (3) what accommodations would be appropriate and effective. (Id. ¶ 23.) Kaiser insists that WAM could not make a job accommodation assessment without a fully completed Medical Inquiry Form. (Id. ¶ 24.)

WAM defers to the physician's assessment as to whether an employee has a disability under the ADA. (DSUMF ¶ 25.) WAM's review of the completed

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[14] Although Kaiser policy allows managers to provide some accommodations without first having them approved by WAM, those were usually limited to situations such as providing an employee with an ergonomic computer mouse, wrist lifts, or a tray that moved a laptop up or down. (DSUMF ¶¶ 61, 63.) Although defendant proposes that plaintiff's request to use the fire door exits at the DCC was not an accommodation plaintiff's supervisors could grant (id. ¶¶ 64-65), Ms. Ogden testified that Ms. Caruthers or Eric Allen (Ms. Caruthers's manager) could have given plaintiff permission to use the non-revolving doors without going through WAM. (PR-DSUMF ¶¶ 64-65, modified per record cited.) The Court excludes DSUMF ¶ 62 as immaterial.

Medical Inquiry Form includes an examination of how the employee's ability to perform his or her job functions is impacted by a disability. (Id. ¶¶ 26, 41.) Kaiser asserts that WAM needed to know how long an accommodation was needed because it sometimes had to get "employees transferred to a department that can accommodate them indefinitely." (Id. ¶ 40.)[15]

If the physician does not complete and return the Medical Inquiry Form to WAM within 15 days, WAM advises the employee that it is not able to make an accommodation determination, asks the employee to have his or her doctor supply the missing information, and gives the employee additional time. (DSUMF ¶ 27.) The burden is on the employee to ensure that WAM receives what it needs from the physician. (Id. ¶ 28.) If WAM approves an accommodation request, it arranges a meeting with the employee and his or her manager to determine how to implement the accommodation. (Id. ¶ 29.) Human Resources is involved in accommodation requests to facilitate these discussions. (Id. ¶ 30.) A copy of Kaiser's "job accommodation" policy is in the record [65-12].

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[15] The Medical Inquiry Form asks if the impairment is permanent, and if it is not, what is the estimated time period the impairment may likely last. (Dandy Dep. Ex. 20 [77], at 394.) Plaintiff points out that Kaiser eventually granted the accommodation to her even though Dr. Miller-Clayton answered "unknown" to that question. (PR-DSUMF ¶ 40.) What the physician actually wrote is, "Unknown, depends on treatment and her response to treatment." (Dandy Dep. Ex. 20 [77], at 394.)

### G. Plaintiff's Short-Term Disability

On March 27, 2017, because of the stress and anxiety caused by Kaiser not giving her permission to use a non-revolving door, plaintiff went out on short-term disability for depression (which lasted through May 15, 2017). (PSUMF ¶ 32; see also DSUMF ¶ 44.) Also on March 27, Ms. Parks informed plaintiff's supervisors that one of her co-workers reported he had let her in a non-revolving door, and noted that plaintiff had "received instruction, notice, counseling and advisement from various members of her management team as well as HR on the proper documentation that must be approved before access can be granted through the emergency doors." (PSUMF ¶ 31.)

### H. WAM Contacts Plaintiff's Doctor

At this point in time, Dr. Crossing was the only physician that plaintiff had identified to WAM. (DSUMF ¶ 42.) On March 27, 2017, WAM advised Dr. Crossing that it was considering plaintiff's request for an accommodation, and faxed Dr. Crossing a request to complete the Medical Inquiry Form to assist WAM in determining whether plaintiff had a disability under the ADA that needed to be accommodated. (Id. ¶ 43.) Because Dr. Crossing was out of the office, her

colleague, Dr. Houria Allia, responded to Kaiser's request. (Id. ¶ 45; see also PSUMF ¶ 33.)[16]

On March 31, 2017, Dr. Allia completed the Medical Inquiry Form stating that plaintiff suffers from claustrophobia, that she was told to avoid being in a closed space (such as a revolving door), and returned it to Ms. Ogden. (PSUMF ¶ 35, modified per record cited; see also Allia Dep. Ex. 2 [83], at 53-54, copy of Form completed by Dr. Allia.) However, Dr. Allia provided no response (and wrote "NA") in the sections of the Form asking: (1) what job function plaintiff was having trouble performing because of her limitation; (2) how plaintiff's limitation interfered with her ability to perform that job function; (3) what suggested possible accommodation could improve plaintiff's ability to perform her job; and (4) how that suggestion would improve plaintiff's ability to perform her job. (DSUMF ¶¶ 46, 54.)

Dr. Allia testified that she wrote "N/A" on the Medical Inquiry Form's question of whether plaintiff's impairment was permanent, because she was "not sure of [plaintiff's] history." (DSUMF ¶ 47, second sentence, modified per record cited.) Dr. Allia also indicated on the Form that plaintiff was not substantially

[16] The fact that someone other than Dr. Crossing completed the Job Accommodation Form was acceptable to Ms. Ogden. (PSUMF ¶ 34.)

limited in any major life activity. (Id. ¶ 50.) However, Dr. Allia testified that she had "no idea" why she did that because she did not know what that term meant under the ADA. (Id. ¶ 47, third sentence, modified per record cited.)

Dr. Allia's goal was not "to address any concerns or any issues with [plaintiff] actually performing her job when she would sit down to work." (DSUMF ¶ 48.) Dr. Allia also testified that she had "no idea what goes on with … [plaintiff]'s work environment whatsoever," and she made no effort to determine whether plaintiff "performs well or not." (Id. ¶ 47, fourth sentence, modified per record cited.) Dr. Allia did not check the box on the Form to indicate whether plaintiff had a physical or mental impairment "[b]ecause I'm not a mental health provider, and I don't know the patient's . . . history." (Id. ¶ 49.) However, Dr. Allia wrote that plaintiff suffers from claustrophobia in the section of the Form that asked, "What is the impairment/diagnosis?" (PR-DSUMF ¶ 49.)

Kaiser interpreted Dr. Allia's answers on the Medical Inquiry Form to mean that plaintiff "didn't have any major life activities affecting her ability to perform her job functions" and "could perform her job functions in spite of having a condition that–in spite of having a condition that [might have] needed an accommodation, that she could perform all of her job functions." (DSUMF ¶ 55.)

After receiving the completed Medical Inquiry Form, Ms. Ogden asked Dr. Allia to clarify, among other things, whether plaintiff only needed to avoid glass

revolving doors or if plaintiff also needed to avoid other confined spaces (such as elevators and staircases), "[b]ecause if she needed to be accommodated in any other enclosed spaces, that was -- we needed to know that so we could make sure that that was put into place as well." (DSUMF ¶ 51.)

In response, Dr. Allia added the following statements to the Medical Inquiry Form in its "Additional Comments" section, which she transmitted via fax to Ms. Ogden on April 3, 2017:

> Patient had extreme traumatic experience involving a revolving door. Please allow her to use regular doors. This does not affect her being in a closed office or bathroom.

(Allia Dep. Ex. 3 [83], at 57, copy of Form completed by Dr. Allia; see also PSUMF ¶ 38.)[17] Dr. Allia concurrently transmitted the following email to Ms. Ogden dated April 3, 2017:

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[17] Ms. Ogden initially testified that this second Medical Inquiry Form submitted by Dr. Allia provided Kaiser with sufficient information to grant the accommodation requested by plaintiff and move forward in the process of meeting with plaintiff's managers on how to implement it. (PSUMF ¶ 38, citing Ogden Dep. Vol. I [70], at 150-52, taken Aug. 20, 2020.) However, as defendant points out, Ms. Ogden changed her testimony. At her second deposition, Ms. Ogden testified that her initial testimony was erroneous, because the "N/As" which remained on the second Form Dr. Allia submitted meant that Kaiser had insufficient information to grant the accommodation plaintiff had requested. (DR-PSUMF ¶ 38, citing Ogden Dep. of Nov. 24, 2020 Vol. II [71] 257-58, 260.) Then, Ms. Ogden confusingly testified that she did not yet have the second Form Dr. Allia submitted when she sent the denial letter on April 6, 2017 (discussed infra). (Ogden Dep. of Nov. 24, 2020 Vol. II [71] 253-54.)

> I am covering Dr. Crossing (who initially put claustrophobic)
> I have talked to the patient and already added a note at the bottom of sheet to be faxed back to you.
> Due to HIPA [sic] I can only say, Please let her use a regular door.
> The experience was extremely traumatic.

(Murphy Dep. Ex. 11 [81], at 223; see also DSUMF ¶ 52).[18]

## I. The Denial Letter of April 6, 2017

On April 6, 2017, Ms. Ogden sent a letter to plaintiff denying her accommodation request. The letter provides in relevant part as follows:

> WAM (Work Absence Management) received the completed "Medical Inquiry" form from your physician. The review process for your job accommodation request has been completed and the following documents were reviewed[:] your completed Job Accommodation Request, your current Specialty Appointment Coordinator job description, and the completed Medical Inquiry forms from your physician.
>
> Your response to question 2 on the Job Accommodation Request form reads as follows: "To use the regular doors". Due to the need for clarification in regards to your request, WAM requested additional information from you via e-mail – which you did provide. The additional requested information included asking for specific location of the doors, which you did provide. After inquiring further about the doors, documentation was provided indicating the doors you referenced are 'Emergency Exit" doors.
>
> The Medical Inquiry form completed by your physician reflects there are not any major life activities affecting your ability to perform your job functions–you can perform your job functions. There also is not indication of you having trouble performing job functions due to limitations, nor is there indication of you having limitations that would

[18] The Court excludes PSUMF ¶¶ 40-41 as immaterial.

> interfere with your ability to perform your job functions. The physician noted "I have talked with the patient–per the patient- patient had extreme traumatic experience involving a revolving door".
>
> Based on the information received from your physician, review of the ADA guidelines and Kaiser Permanente Job Accommodation policy your request to enter the building via the "Emergency Exit" doors is not reasonable or feasible. There is not documentation to support you have a qualifying ADA condition which would require the necessity for Kaiser Permanente to provide a job accommodation to assist you with performing the essential functions of your job or allow you to enter the building via the "Emergency Exit" doors.

(Murphy Dep. Ex. 12 [81], at 224.)[19]

Even though plaintiff's accommodation request was denied, WAM "would certainly revisit it once we got the information that was necessary to help with–to help with approving the–her request." (DSUMF ¶ 56.) Ms. Ogden testified that she denied the accommodation because the physician did not complete the Job Accommodation Form in its entirety; the doctor did not provide information on whether the employee needed any other accommodation; and the physician did not disclose whether the condition was permanent. (PSUMF ¶ 37, modified per record cited.)

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[19] Because the parties disagree on how the letter should be interpreted (compare DSUMF ¶ 53, with PSUMF ¶ 36), the Court has quoted it in the text.

### J. Plaintiff's May 20, 2017 Accommodation Request

On May 4, 2017, plaintiff saw Dr. Miller-Clayton. (DSUMF ¶ 66, modified per record cited.) Plaintiff received a "Verification of Treatment" form for that visit in which Dr. Miller-Clayton indicated that plaintiff had PTSD. The form also contained the following restriction: "[Plaintiff] may access and leave the workplace building through a non-revolving door." (Id. ¶ 67, modified per record cited; see also PSUMF ¶¶ 42-43.)

When plaintiff returned from short-term disability on or about May 15, 2017, Ms. Caruthers instructed her to use the revolving door. (PSUMF ¶ 44.) Plaintiff used medication prescribed by a doctor to help her cope with entering through the revolving door. (Id. ¶ 45.)

On May 20, 2017, plaintiff submitted another Job Accommodation Request Form to Kaiser, along with Dr. Miller-Clayton's Verification of Treatment form. (PSUMF ¶ 46.) Dr. Miller-Clayton's form indicated that plaintiff "will submit updated ADA Accommodation Paperwork to formalize these accommodations." (DSUMF ¶ 68.)

In response to plaintiff's submission of that Verification of Treatment form to WAM, Angenetta Dandy emailed plaintiff on May 22, 2017, stating that, "[i]n order for HR-WAM to complete the review and determination process per KP Job Accommodation Policy & ADA guidelines," it would send a Medical Inquiry Form

to plaintiff's medical provider. (DSUMF ¶ 69.)[20] Plaintiff responded on May 24, 2017 by identifying Dr. Miller-Clayton and providing a fax number to which WAM could send the Medical Inquiry Form for completion. (Id. ¶ 70.) On May 25, 2017, Ms. Dandy faxed the Medical Inquiry Form to Dr. Miller-Clayton at the number plaintiff provided. (Id. ¶ 71.)

As of June 19, 2017, WAM had not received the Medical Inquiry Form back from Dr. Miller-Clayton, and advised plaintiff that it could not move forward with her ADA accommodation request. (DSUMF ¶ 72.) The next day, Ms. Dandy received a voice mail message from Dr. Miller-Clayton indicating that she had not received the Medical Inquiry Form. (Id. ¶ 73.) Dr. Miller-Clayton provided a fax number for WAM to send her the form which was different than the fax number plaintiff had given WAM. (Id. ¶ 74.)

Ms. Dandy faxed the Medical Inquiry Form to Dr. Miller-Clayton on June 28, 2017, and the physician returned the completed Form to WAM the next day. (DSUMF ¶ 75, modified per record cited.) In the Form, Dr. Miller-Clayton completed the section asking what job function plaintiff was having trouble performing because of her limitation, and stated that plaintiff's limitation interfered

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[20] It is Kaiser's policy not to allow an interim accommodation until its process is complete. (PSUMF ¶ 47, as modified per record cited.) The Court excludes DSUMF ¶ 57 as unsupported by the record cited or duplicative.

with her ability to perform her job functions because she would "have difficulty effectively attending to customer/member needs if she is emotionally distressed as a result of anxiety. If she is unable to gain entry or exit to the building of employment without distress, that will impact her performance of being at work as well." (Id. ¶ 76.)

Dr. Miller-Clayton also stated that allowing plaintiff to use a non-revolving door would improve her ability to perform her job because a "decreased level of anxiety and distress coming to work and when she arrives or prepares to leave work will help her attention and focus with regard to meeting member need over the phone or face to face as well as her ability to be courteous and customer focused." (DSUMF ¶ 78.) Plaintiff was suspended from work effective July 11, 2017 for reasons unrelated to this lawsuit. (Id. ¶ 79.) As discussed infra, she returned to work on July 29, 2017.

### K. Kaiser Approves the Accommodation

Ms. Dandy analyzed whether the accommodation sought by plaintiff would be an undue hardship and determined that it would not be. (PSUMF ¶ 50.) Ms. Dandy advised the DCC management and plaintiff's supervisor "that we needed to accommodate, that was the point where the decision was actually made. The meeting request was to discuss with the management team, you know, what, that we actually need to do something and to find out what would be done to allow her

access to the building without having to enter and exit the revolving doors." (DSUMF ¶ 80.) Kaiser Operations Manager April Thomas advised Ms. Parks that "effective immediately, [plaintiff] will be granted the use of the front entrance (non-revolving door) at the [DCC]. A few details need to be clarified with you to ensure there is consistent availability to accommodate her entries since door access requires that Security personnel let her in the door." (Id. ¶ 81.)

By letter dated July 21, 2017, WAM advised plaintiff that her accommodation request had been approved and that, to ensure that the accommodation was implemented in a timely manner, DCC management and Facilities staff "have been notified to arrange for your access to the building through regular [i.e., non-revolving] doors during your scheduled work hours." (DSUMF ¶ 82.)[21] Dr. Miller-Clayton opined that giving plaintiff access to the DCC through a non-revolving door that had to be unlocked was an acceptable accommodation. (Id. ¶ 9[2].)

[21] Ms. Ogden initially testified that Kaiser managers held a meeting, perhaps in late-April 2017, to implement the accommodation. (PSUMF ¶ 39.) However, she added that plaintiff was out on leave, so they did not proceed, and the file was then transferred from her to Ms. Dandy. (DR-PSUMF ¶ 39, modified per record cited.)

## L. Plaintiff's Return to Work

Plaintiff returned to work on July 29, 2017. (DSUMF ¶ 83.) She reported having a problem getting into the DCC – no one was at the doors to let her in, and plaintiff "ended up calling the weekend Supervisor to let her in." (Id. ¶ 84.) Upon further investigation, Kaiser determined that Ms. Parks had misspoken during the discussion about the accommodation by stating that there were always two security personnel on duty; in fact, there were times when only one security officer was on duty. (Id. ¶ 85.) This security officer was responsible for completing an hourly round of the facility, and was therefore sometimes not at the front desk (and available to allow plaintiff in the fire exit door). (Id. ¶ 86.) To prevent future incidents and ensure that there was always somebody at the door "[s]o anytime she went out or came in there would be somebody there to open the door," Ms. Parks had a second security person put on schedule. (Id. ¶ 87.) Additionally, a meeting was held "to ensure that [plaintiff] can get in and out of the building, that this kind of mishap cannot happen again, and if we need to make some changes to what the plans are then we need to make some changes to the plan." (Id. ¶ 88.) The change made was, from August 10 forward, to leave the fire exit door unlocked from 7:00 a.m. to 7:00 p.m., Sunday through Saturday, which would allow plaintiff to go in and out whenever she wanted between those hours on those days. (Id. ¶ 89.)

On October 12, 2017, when plaintiff arrived at work the door was locked, and the security guard had to let her in. (DSUMF ¶ 90.) Ms. Parks investigated how this happened, and determined that the security guard on duty was unaware of the requirement that the door be left unlocked for plaintiff. (Id. ¶ 91.)

## II. SUMMARY JUDGMENT STANDARD

A "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." See Fed. R. Civ. P. 56(a). The party moving for summary judgment bears the initial burden of "informing the court of the basis for its motion and of identifying those materials that demonstrate the absence of a genuine issue of material fact." Rice-Lamar v. City of Fort Lauderdale, 232 F.3d 836, 840 (11th Cir. 2000) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). Those materials may include "depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A). "Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that

precludes summary judgment." Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991).

The non-moving party is then required "to go beyond the pleadings" and present competent evidence "showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324. Generally, "[t]he mere existence of a scintilla of evidence" supporting the non-movant's case is insufficient to defeat a motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). If in response the non-moving party does not sufficiently support an essential element of his case as to which he bears the burden of proof, summary judgment is appropriate. Rice-Lamar, 232 F.3d at 840. "In determining whether genuine issues of material fact exist, [the Court] resolve[s] all ambiguities and draw[s] all justifiable inferences in favor of the non-moving party." Id. (citing Anderson, 477 U.S. at 255).

In deciding a summary judgment motion, the court's function is not to resolve issues of material fact but rather to determine whether there are any such issues to be tried. Anderson, 477 U.S. at 251. The applicable substantive law will identify those facts that are material. Id. at 248. Facts that are disputed, but which do not affect the outcome of the case, are not material and thus will not preclude the entry of summary judgment. Id. Genuine disputes are those in which "the evidence is such that a reasonable jury could return a verdict for the nonmoving

party." Id. For factual issues to be "genuine," they must have a real basis in the record. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). When the record as a whole could not lead a rational trier of fact to find for the non-movant, there is no "genuine issue for trial." Id. at 587.

## III. DISCUSSION

Plaintiff seeks entry of partial summary judgment in its favor on liability, asserting that Kaiser violated its duty to accommodate her disability by its six-month delay in granting her request to use a non-revolving door to enter the DCC. Kaiser rejects that assertion and contends that summary judgment should be granted in its favor because an accommodation is only required if it enables an employee to perform the essential functions of her job. Kaiser claims that as soon as it obtained information about how plaintiff's impairment interfered with her ability to perform essential job functions, it granted the proposed accommodation. As discussed below, given the statutory language and interpretive regulations, Kaiser took too narrow a view of its reasonable accommodation obligation.

The ADA provides that "[n]o covered entity shall discriminate against a qualified individual[22] on the basis of disability in regard to job application

[22] "The term 'qualified individual' means an individual 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).

procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). As used in that section, the term "discriminate against a qualified individual on the basis of disability" includes—

> not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.

Id. § 12112(b)(5)(A).

The ADA defines a "disability" as "(A) a physical or mental impairment[23] that substantially limits[24] one or more major life activities of [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(1). "[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." Id. § 12102(2)(A).

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[23] Given that no physical impairment is at issue here, a mental impairment is "[a]ny mental or psychological disorder, such as an intellectual disability (formerly termed "mental retardation"), organic brain syndrome, emotional or mental illness, and specific learning disabilities." 29 C.F.R. § 1630.2(h)(2).

[24] An impairment is a disability "if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population." 29 C.F.R. § 1630.2(j)(1)(ii).

Utilizing these statutory principles, courts have outlined what a plaintiff must establish to succeed on a "failure to accommodate" claim. "To establish a *prima facie* claim for failure to accommodate, [plaintiff] must show that (1) she is disabled; (2) she was a 'qualified individual' at the relevant time, meaning she could perform the essential functions of the job in question with or without reasonable accommodation; and (3) she was discriminated against by way of the defendant's failure to provide a reasonable accommodation." Solloway v. Clayton, 738 F. App'x 985, 987 (11th Cir. 2018) (per curiam).[25] If a plaintiff establishes all three elements, then the burden shifts to the employer to prove that the plaintiff's requested accommodation imposes an undue hardship. Terrell v. USAir, 132 F.3d 621, 624 (11th Cir. 1998).[26]

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[25] When a plaintiff contends that her employer failed to accommodate her disability, the McDonnell Douglas burden shifting framework adopted from Title VII cases is inapplicable. See Nadler v. Harvey, No. 06-12692, 2007 WL 2404705, at *8 (11th Cir. Aug. 24, 2007) ("An employer *must* reasonably accommodate an otherwise qualified employee with a *known* disability unless the accommodation would impose an undue hardship in the operation of the business. . . . Thus, applying McDonnell Douglas to reasonable accommodation cases would be superfluous, since there is no need to prove discriminatory motivation.") (unpublished); see also Harris v. Atlanta Indep. Sch. Sys., No. 1:07-CV-2086-RWS/AJB, 2009 WL 10665027, at *32 (N.D. Ga. Aug. 9, 2009) ("In failure to accommodate cases . . . the McDonnell Douglas framework is inapplicable.").

[26] Kaiser does not assert the undue hardship affirmative defense here.

With regard to element (1), Ms. Ogden testified that Dr. Crossing's note of January 18, 2017 was sufficient to show that plaintiff is disabled (i.e., that she had a mental impairment that substantially limited one or more major life activities). See supra Part I.E. Given Ms. Ogden's testimony, Kaiser's contention that Dr. Crossing's note did not put it on notice that plaintiff was disabled (Def.'s Br. [85-1] 20) is not well taken.

With regard to element (2), plaintiff meets the statutory definition of a "qualified individual." See 42 U.S.C. § 12111(8) ("The term 'qualified individual' means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.").[27] "An employee with a disability who actually has performed in the desired position for several years should be deemed to be a qualified individual." Cooper v. Walker Cty. E-911, No. 6:16-CV-1746-TMP, 2018 WL 3585217, at *11 (N.D. Ala. July 26, 2018); see also Barton v. Tampa Elec. Co., No. 95-1986-CIV-T-17E, 1997 WL 128158, at *3 (M.D. Fla. Mar. 11, 1997) (employee performed in the cashier position for several years and was promoted, which means she

[27] See also 29 C.F.R. § 1630.2(m) ("The term 'qualified,' with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education, and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position.").

possessed the requisite skill required for the cashier position); Wilson v. Gayfers Montgomery Fair Co., 953 F. Supp. 1415, 1421 (M.D. Ala. 1996) ("Wilson performed his job as department manager for approximately 3 years, indicating that he was able to perform the essential functions of the job.").

In this case, Kaiser admitted PSUMF ¶¶ 48-49, which proposed that plaintiff met the actual skills and experience necessary to perform her job, and that because she was already working in the position, she met the minimum qualifications for it, and was considered "qualified" for purposes of reviewing her accommodation request. Finally, even Dr. Allia's first note ([83], at 54) states that plaintiff "can perform her job duties." Plaintiff therefore was a "qualified individual." Her problem was going through revolving doors.

This leaves for discussion element (3) of a failure to accommodate claim, i.e., whether plaintiff was discriminated against by way of defendant's failure to provide a reasonable accommodation. Under the ADA, an employer has two separate reasonable accommodation obligations:

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) 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)[28]; cf. US Airways, Inc. v. Barnett, 535 U.S. 391, 415 (2002) ("Subsection (A) clearly addresses features of the workplace that burden the disabled *because* of their disabilities. Subsection (B) is broader in scope but equally targeted at disability-related obstacles.") (Scalia, J., dissenting).

Plaintiff argues that Subsection (A) imposed an accommodation duty on Kaiser to make its existing facility (the DCC) "readily accessible to and usable by individuals with disabilities," like Ms. Murphy. See 42 U.S.C. § 12111(9)(A). Allowing her to enter through a non-revolving door would have made the DCC accessible to her.

Plaintiff finds support for its position in the Technical Assistance Manual on the Employment Provisions (Title I) of the Americans With Disabilities Act ("TAM") (1992). Section 3.5 of the TAM states, "Accommodations may include: making facilities readily accessible to and usable by an individual with a disability." The TAM also provides as follows:

> The employer's obligation under Title I is to provide access for an individual applicant to participate in the job application process, and for an individual employee with a disability to perform the essential functions of his/her job, *including access to a building*, to the work site, to needed equipment, and to all facilities used by employees. The employer must provide such access unless it would cause an undue hardship.

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[28] This two-pronged statutory reasonable accommodation command is repeated in the EEOC's regulations. See 29 C.F.R. § 1630.2(o)(2)(i)-(ii).

Id. § 3.10 (emphasis added).

The EEOC's Interpretive Guidance on Title I of the Americans With Disabilities Act similarly provides as follows:

> The reasonable accommodation requirement is best understood as a means by which barriers to the equal employment opportunity of an individual with a disability are removed or alleviated. These barriers may, for example, be physical or structural obstacles that inhibit or prevent the access of an individual with a disability to job sites, facilities or equipment.

29 C.F.R. § 1630, app.[29]

Although neither the parties nor the Court located any Eleventh Circuit authority interpreting § 12111(9)(A), two cases from other Circuits have. See Burnett v. Ocean Props., Ltd., 987 F.3d 57 (1st Cir. 2021); Feist v. La., Dep't of Justice, 730 F.3d 450 (5th Cir. 2013).

In Burnett, the plaintiff was a paraplegic who had problems getting his wheelchair through the heavy wooden doors of the building that housed the call center where he worked. Burnett, 987 F.3d at 60-61, 68. After his employer would not respond to his request for installation of push-button, automatic doors, Burnett sued for disability discrimination, asserting that his employer failed to

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[29] Kaiser's own Job Accommodation Policy provides: "Accommodation may include [m]aking facilities accessible." (Kaiser Policy NATL.HR.027, Section 5.1.2.1 [65-12], at 3.)

accommodate him concerning the doors. Id. at 62. At trial the employer moved for judgment as a matter of law because Burnett had not shown that his requested accommodation was reasonable since he could perform the job's essential functions. Id. After denial of that motion and entry of judgment on a jury verdict in plaintiff's favor, the employer appealed, arguing that since the evidence showed that Burnett was actually performing the duties of his job, he did not need an accommodation and his requested accommodation was unreasonable. Id. at 68. In rejecting the employer's argument, the First Circuit held as follows:

> There was sufficient evidence that Burnett needed an accommodation and that his requested accommodation was reasonable. Burnett testified that, daily, he experienced difficulty entering the clubhouse and once injured his wrist when doing so. The fact that Burnett was able to enter the clubhouse (at the risk of bodily injury) despite this difficulty and to perform the duties of an associate once inside does not necessarily mean he did not require an accommodation or that his requested accommodation was unreasonable, as Appellants claim. A "'reasonable accommodation' may include . . . making existing facilities used by employees readily accessible to and usable by individuals with disabilities." 42 U.S.C. § 12111(9)(A); see also Me. Stat. tit. 5, § 4553(9-A)(A). Moreover, the Supreme Court clarified in U.S. Airways, Inc. v. Barnett that "[t]he [ADA] requires preferences in the form of 'reasonable accommodations' that are needed for those with disabilities to obtain the same workplace opportunities that those without disabilities automatically enjoy." 535 U.S. 391, 397, 122 S. Ct. 1516, 152 L.Ed.2d 589 (2002). Viewing the evidence in the light most favorable to the verdict, see Suero-Algarín, 957 F.3d at 37, the evidence presented shows that the existing doors were not "readily accessible to and usable by" Burnett and that an accommodation was necessary for Burnett to reach a level playing field as an employee without a disability.

Id. at 68-69 (footnote omitted).

Similarly, in Feist, a former assistant attorney general argued that her employer violated the ADA by declining to provide her with a free, on-site parking space to accommodate her disability (osteoarthritis of the knee). Feist, 730 F.3d at 451. The district court granted summary judgment, holding that the plaintiff failed to explain how denial of an on-site parking space limited her ability to perform the essential functions of her job. Id. at 452. Plaintiff appealed, arguing that the ADA does not require a link between a requested accommodation and an essential job function. Id. The Fifth Circuit agreed. Id. at 453.

Feist began its analysis by quoting § 12111(9) of the ADA and observing that the statute's text "gives no indication that an accommodation must facilitate the essential functions of one's position." 730 F.3d at 453. Indeed, granting the requested on-site parking space "would presumably have made [plaintiff's] workplace 'readily accessible to and useable' by her, and therefore might have been a potentially reasonable accommodation pursuant to § 12111(9)(A)." Id.[30] "[B]ecause the district court erred in requiring a nexus between the requested

[30] The Fifth Circuit also relied upon 29 C.F.R. § 1630.2(o)(1), which the Court addresses infra. See Feist, 730 F.3d at 453-54.

accommodation and the essential functions of Feist's position," the Fifth Circuit vacated the judgment and remanded the case for further proceedings. Id. at 454.[31]

The text of § 12111(9)(A), as interpreted by Burnett and Feist, shows that Kaiser had a reasonable accommodation obligation to make the DCC readily accessible to plaintiff. That obligation could easily have been met by allowing plaintiff to use a non-revolving door within a reasonable time after she made that request.

In addition to the reasonable accommodation duty imposed by § 12111(9)(A) of the ADA, the EEOC's regulations impose the following additional reasonable accommodation duties upon an employer:

> (o) Reasonable accommodation.
>
> (1) The term reasonable accommodation means:
> . . .
>
> (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily

[31] The Fifth Circuit followed Feist in Stokes v. Nielsen, 751 F. App'x 451 (5th Cir. 2018) (per curiam). In Stokes, the district court granted summary judgment to the employer, holding that because a reasonable accommodation is only required when necessary to perform an essential function of a job, a reasonable juror could not find that the employer had failed to reasonably accommodate plaintiff's disability. On appeal, the court reversed, stating as follows: "[O]ur circuit has explicitly rejected the requirement that requested modifications must be necessary to perform essential job functions to constitute a reasonable accommodation." Id. at 454 (citing Feist, 730 F.3d at 452-53).

> performed, that enable an individual with a disability who is qualified to perform the essential functions of that position; or
>
> (iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

29 C.F.R. § 1630.2(o)(1)(ii)-(iii).

The EEOC argues that Kaiser's granting of Ms. Murphy's request to use non-revolving doors would have allowed her to enjoy benefits and privileges of employment equal to those enjoyed by her co-workers without disabilities. (EEOC's Br. [64-1] 25.) Just as with § 12111(9)(A) of the ADA, the parties and the Court have located no Eleventh Circuit authority applying the "equal benefits and privileges" language of 29 C.F.R. § 1630.2(o)(1)(iii).[32] Thus, the Court looks to regulatory guidance, cases from other jurisdictions, and a district court case from this Circuit.

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[32] However, the Eleventh Circuit has recognized the distinction between the two subsections. See Novella v. Wal-Mart Stores, Inc., 226 F. App'x 901, 903 (11th Cir. 2007) (per curiam) ("[EEOC] regulations define the term 'reasonable accommodation' to include both modifications that enable an employee to 'perform the essential functions' of the job, and modifications that enable an employee to "enjoy the equal benefits and privileges of employment' as other, non-disabled employees.") (quoting 29 C.F.R. § 1630.2(o)(1)(ii), (iii)).

The aforementioned TAM defines "benefits and privileges of employment" to include things such as access to facilities and social events. TAM § 7.12. The EEOC's Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA (10-17-2002) ("Enforcement Guidance"), after quoting 29 C.F.R. § 1630.2(o)(1), states as follows:

> The duty to provide reasonable accommodation is a fundamental statutory requirement because of the nature of discrimination faced by individuals with disabilities. Although many individuals with disabilities can apply for and perform jobs without any reasonable accommodations, there are workplace barriers that keep others from performing jobs which they could do with some form of accommodation. These barriers may be physical obstacles (such as inaccessible facilities or equipment), or they may be procedures or rules (such as rules concerning when work is performed, when breaks are taken, or how essential or marginal functions are performed). Reasonable accommodation removes workplace barriers for individuals with disabilities.

Enforcement Guidance at 6.

In a section entitled, "Reasonable Accommodation Related to the Benefits and Privileges of Employment," the Enforcement Guidance provides as follows:

> The ADA requires employers to provide reasonable accommodations so that employees with disabilities can enjoy the "benefits and privileges of employment" equal to those enjoyed by similarly-situated employees without disabilities. Benefits and privileges of employment include, *but are not limited to*, employer-sponsored: (1) training, (2) services (e.g., employee assistance programs (EAP's), credit unions, cafeterias, lounges, gymnasiums, auditoriums, transportation), and (3) parties or other social functions (e.g., parties to celebrate retirements and birthdays, and company outings).

Id. at 19 (emphasis added).

A number of cases have applied the "equal benefits and privileges" language of 29 C.F.R. § 1630.2(o)(1)(iii), including one where Kaiser was a party. See Lee v. Kaiser Found. Health Plan of the Nw., No. 3:16-CV-01991-YY, 2018 WL 4523142 (D. Or. Apr. 9, 2018), R. & R. adopted in part, rejected in part, 2018 WL 3090195 (D. Or. June 20, 2018).[33] Although the issue in Lee is not the same one raised here, its analysis is helpful. Thus, the Court begins with it.

The plaintiff in Lee alleged that Kaiser had violated the ADA by failing reasonably to accommodate her with a Wednesday-Sunday schedule, which would have allowed her to work forty hours per week and enjoy the same privileges and benefits as those Kaiser employees without disabilities. Lee, 2018 WL 4523142, at *6. Kaiser argued that it was entitled to summary judgment because it had reasonably accommodated plaintiff's disability by allowing her to take paid and unpaid sick leave on an as-needed basis and that this accommodation allowed her to perform her job's essential functions. Id. at *5. Lee countered that Kaiser's accommodation forced her to use her accrued sick leave for Mondays and Tuesdays, which resulted in economic losses including a loss of accrued sick time, loss of

[33] The district judge rejected only that part of the magistrate judge's recommendation enumerating the elements of a prima facie failure to accommodate claim. Lee, 2018 WL 3090195, at *2 n.1. That is immaterial to the following discussion.

premium pay for Saturdays and Sundays, and loss of contributions to her Supplemental Pension Plan in the approximate amount of $64,000. Id. at *6.

The Lee court first noted that 29 C.F.R. § 1630.2(o)(1)(ii), which requires modifications and adjustments to perform "essential functions," is distinct from 29 C.F.R. § 1630.2(o)(1)(iii), which requires modifications and adjustments to enjoy "equal benefits and privileges," and that both provisions are equally enforceable. Lee, 2018 WL 4523142, at *6. According to the court, "They are independent requirements of the duty to provide a reasonable accommodation. Otherwise stated, that a modification or adjustment satisfies one of the provisions of 29 C.F.R. § 1630.2(o)(1), does not mean that the employer has satisfied its duty to reasonably accommodate the employee's disability under the other provisions." Id.

Lee noted that Buckingham v. United States, 998 F.2d 735 (9th Cir. 1993), had recognized the distinction between subsections (ii) and (iii) of 29 C.F.R. § 1630.2(o)(1).[34] Buckingham made the following observations about essential functions:

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[34] Other courts recognizing that employers have separate duties under subsections (ii) and (iii) of 29 C.F.R. § 1630.2(o)(1) include Merrill v. McCarthy, 184 F. Supp. 3d 221, 238 (E.D.N.C. 2016) ("To be sure, an employer has a duty to provide reasonable accommodations that enable a disabled employee to perform essential job functions. 29 C.F.R. § 1630.2(o)(1)(ii). But, that is not the employer's only duty. If the employee needs reasonable accommodation to enable her 'to enjoy equal benefits and privileges of employment' [under § 1630.2(o)(1)(iii)], the employer is obligated to provide it as well."); Feist, 730 F.3d at 453 (recognizing

> [E]mployers are not relieved of their duty to accommodate when employees are already able to perform the essential functions of the job. Qualified handicapped employees who can perform all job functions may require reasonable accommodation to allow them to . . . enjoy the privileges and benefits of employment equal to those enjoyed by non-handicapped employees. . . . In other words, an employer is obligated not to interfere, either through action or inaction, with a handicapped employee's efforts to pursue a normal life.

998 F.2d at 740 (citation omitted).

Kaiser asserted in Lee that "'[t]he purpose of a reasonable accommodation is to enable an employee to perform the essential functions of a position,' and that it provided Lee with such an accommodation when it allowed her to take leave on an intermittent basis." Lee, 2018 WL 4523142, at *7. The Lee court rejected Kaiser's assertion about essential functions because its

> "understanding of reasonable accommodation is inconsistent with other provisions in the [ADA]." Life Techs, 2010 WL 4449365, at *5. The ADA's "definition of a 'qualified individual with a disability' includes those who can 'perform the essential functions of the employment position' 'without reasonable accommodations.'" Id.

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that under 29 C.F.R. § 1630.2(o)(1), a modification that enables an individual to perform the essential functions of a position is only one of three categories of reasonable accommodation); EEOC v. Life Technologies Corp., WMN-09-2569, 2010 WL 4449365, at *4 (D. Md. Nov. 4, 2010) ("[29 C.F.R. § 1630.2(o)(1)(iii)] . . . requires employers to make modifications and adjustments, not just to minimally permit disabled employees to do their job, but also to permit them to enjoy all of the 'benefits and privileges' of the job as would any other employee"); and Campbell v. Wal-Mart Stores, Inc., 272 F. Supp. 2d 1276, 1291 (N.D. Okla. 2003) ("Plaintiff's contention that the purpose of a reasonable accommodation is not merely for the performance of job functions, but also to enable employees to 'enjoy the privilege and benefits of employment' is well-taken.").

> (citing 42 U.S.C. § 12111(8)). "Implicit in that definition is the expectation that some accommodations are provided to do more than just permit the qualified individual with a disability to perform the essential functions of the position." Id.; see also Scalera v. Electrograph Sys., Inc., 848 F. Supp. 2d 352, 366 (E.D.N.Y. 2012) ("Defendants' interpretation of the ADA is too narrow. . . . [The] requested accommodations did not necessarily have to go to essential functions of the job, as long as Plaintiff could perform the essential functions of her job, with or without accommodations."); Cadoret v. Sikorsky Aircraft Corp., No. 3:15CV1377 (JBA), 2018 WL 806548, at *4 (D. Conn. Feb. 9, 2018) ("Despite the fact that Plaintiff concedes he can perform the essential functions of his job, there is a triable issue of fact with respect to whether Plaintiff required an ASL interpreter to access meetings and trainings in the workplace in order to receive equal benefits and privileges of employment.").

Id.[35]

After finding that sick leave accrual, premium pay, and supplemental pension contributions were, as plaintiff contended, "benefits and privileges of employment," Lee, 2018 WL 4523142, at *7-8, the court concluded that the plaintiff had presented evidence that Kaiser did not provide her with a modification

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[35] See also Sanchez v. Vilsack, 695 F.3d 1174, 1181-83 (10th Cir. 2012) (rejecting argument that accommodations are only required if an employee cannot perform the essential functions of a job because accommodation may be needed to allow an employee to enjoy the privileges and benefits of employment equal to those enjoyed by non-disabled employees); Clark v. Sch. Dist. Five of Lexington & Richland Ctys., 247 F. Supp. 3d 734, 744-45 (D.S.C. 2017) ("A plaintiff may also be entitled to a reasonable accommodation if it enables him or her to enjoy 'equal benefits and privileges' of employment."). Some of the cases discussed herein (i.e., Buckingham and Sanchez) arose under the Rehabilitation Act. However, because courts assess Rehabilitation Act claims under the ADA rubric, see Cash v. Smith, 231 F.3d 1301, 1305 (11th Cir. 2000), those cases are persuasive.

or adjustment that allowed her to enjoy the same benefits and privileges as her non-disabled counterparts. Id. at *8-9. Thus, the case was sent to trial. According to the court, qualified individuals who can perform all job functions may still require reasonable accommodation to allow them to enjoy the privileges and benefits of employment equal to those enjoyed by non-disabled employees. Id. at *9.

Finally, in Adams v. Crestwood Medical Center, 5:18-CV-01443-HNJ, 2020 WL 7049856 (N.D. Ala. Dec. 1, 2020), a district court in this Circuit discussed the "equal benefits and privileges" concept. Id. at *27. Adams first noted that the reasonableness of the plaintiff's requested accommodation did not, by logical necessity, turn upon his performance of the essential functions of his position. Id. at *30. It then listed numerous district courts in this Circuit (including two from this District) which have recognized that an employer's reasonable accommodation obligation extends to equal benefits and privileges. Id. The Adams court likewise listed several Circuit courts which have upheld "the proposition that the ADA does not limit reasonable accommodations to those facilitating the performance of essential functions." Id. at *31 (citing, inter alia, Stokes, 751 F. App'x at 454; Feist, 730 F.3d at 453; Sanchez, 695 F.3d at 1181; Buckingham, 998 F.2d at 740).

This extended discussion shows that Kaiser had a reasonable accommodation obligation arising both from 42 U.S.C. § 12111(9)(A), which requires an employer to make existing facilities readily accessible to and usable by

individuals with disabilities, and from 29 C.F.R. § 1630.2(o)(1)(iii), which requires an employer to make modifications that enable an employee with a disability to enjoy benefits and privileges of employment equal to those enjoyed by non-disabled employees. This discussion also shows that courts applying these provisions hold that the ADA does not limit reasonable accommodation to those which facilitate an employee's performance of essential job functions. Under these authorities, Kaiser was obliged by statute and regulation to allow Ms. Murphy through a non-revolving door without waiting to see whether her disability impacted her ability to perform the essential functions of her job. Kaiser owed plaintiff that accommodation so that its facility was readily accessible to and usable by her as an individual with a disability and so that plaintiff could enjoy benefits and privileges of employment equal to those enjoyed by non-disabled employees.

Nevertheless, Kaiser relies heavily on years of Eleventh Circuit precedent which holds as follows: "An accommodation is 'reasonable' and necessary under the ADA . . . only if it enables the employee to perform the essential functions of the job." Holly v. Clairson Indus., LLC, 492 F.3d 1247, 1256 (11th Cir. 2007) (quoting Lucas v. W.W. Grainger, Inc., 257 F.3d 1249, 1259-60 (11th Cir. 2001)); see also Barneman v. Int'l Longshoreman Ass'n Local 1423, 840 F. App'x 468, 478 (11th Cir. 2021) (per curiam) (same); LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 835 (11th Cir. 1998) (same). Kaiser argues that these cases are

clear—an ADA job accommodation is only required if it enables the employee to perform the essential functions of her job. (Def.'s Reply Br. [101] 12.) In other words, Kaiser believes that until it knew whether the requested accommodation would help plaintiff perform her job's essential functions, it was not required to allow her to use a non-revolving door to enter the DCC.

The Court makes two observations about Kaiser's argument. First, none of the above-cited cases address the issue raised here, which is plaintiff's need for accommodation to enter the workplace. The undersigned believes that, should the Eleventh Circuit eventually hear this case, it would follow decisions from other Circuits like Feist and Burnett, both of which are addressed at length, supra, and not the above-cited Holly line of cases.

Second, the statement from Holly that an accommodation is reasonable and necessary under the ADA only if it enables the employee to perform the essential functions of the job originated in LaChance in 1998. 146 F.3d at 832. To support that statement, LaChance cited 29 C.F.R. § 1630.2(o)(1)(ii). See LaChance, 146 F.3d at 835 n.9. As has already been shown, this subsection of the regulation defines "reasonable accommodation" as modifications or adjustments to the work environment, or to the manner or circumstances under which the position held is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position.

LaChance did not cite 29 C.F.R. § 1630.2(o)(1)(iii), which defines "reasonable accommodation" as including modifications or adjustments that enable an employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities. Thus, while essential functions might be relevant to reasonable accommodations that make modifications or adjustments to the work environment, or to the manner or circumstances under which the position held is customarily performed, essential functions are not relevant to modifications or adjustments that enable an employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.[36]

As also discussed supra, subsections (ii) and (iii) of 29 C.F.R. § 1630.2(o)(1) are equally enforceable. Lee, 2018 WL 4523142, at *6. "They are independent requirements of the duty to provide a reasonable accommodation." Id. Accordingly, even if the statement relied upon by Kaiser applies, it applies only to

[36] That sentence from LaChance appeared again in 2001, where the Eleventh Circuit in Lucas stated that an accommodation is reasonable and necessary only if it enables the employee to perform the essential functions of the job. See Lucas, 257 F.3d at 1255. In 2007, Holly used that sentence and cited in support Lucas, LaChance, and 29 C.F.R. § 1630.2(o)(1)(ii). See Holly, 492 F.3d at 1256. Finally, in 2021, the Circuit again cited that principle in Barneman and relied upon Holly. Barneman, 840 F. App'x at 478.

accommodations required by § 1630.2(o)(1)(ii), not accommodations required by § 1630.2(o)(1)(iii).

In sum, the undersigned **REPORTS** that the Eleventh Circuit would not follow the precedent containing the sentence upon which Kaiser relies, or would distinguish it because the sentence does not undermine the employer's duty to make accommodations that enable an employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

## IV. CONCLUSION

For the reasons explained above, the undersigned **RECOMMENDS** that Plaintiff EEOC's Motion for Partial Summary Judgment [64] as to liability be **GRANTED** and Defendant Kaiser's Motion for Summary Judgment [85] be **DENIED**.

Although the undersigned recommends entry of partial summary judgment to the EEOC on the question of Kaiser's liability, the amount of any damages owed by defendant and when those damages began to accrue must be decided by the jury.

The Clerk is **DIRECTED** to terminate the reference to the undersigned Magistrate Judge.

**SO RECOMMENDED**, this 19th day of April, 2021.

WALTER E. JOHNSON
UNITED STATES MAGISTRATE JUDGE