

TH 07-0063-C Y/H Vanes v ICPR
Judge Richard L. Young

Signed on 4/2/09

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

WILLIAM R VANES,)	
)	
Plaintiff,)	
vs.)	NO. 2:07-cv-00063-RLY-WGH
)	
INDIANA COMMISSION ON PUBLIC)	
RECORDS,)	
)	
Defendant.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

WILLIAM R. VANES,)
Plaintiff,)
)
vs.) 2:07-cv-063-RLY-WGH
)
INDIANA COMMISSION ON PUBLIC)
RECORDS,)
Defendant.)

**ENTRY ON DEFENDANT’S MOTION FOR SUMMARY JUDGMENT and
PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiff suffers from cerebral palsy. From September 19, 1983, until March 10, 2006, he was employed by the Indiana Commission on Public Records (“ICPR”) as a microfilmer. In his Complaint, Plaintiff seeks redress under the Rehabilitation Act of 1973, alleging that ICPR terminated him because of his disability and failed to accommodate his disability. The ICPR now moves for summary judgment on Plaintiff’s claims. Plaintiff cross-moves for partial summary judgment on grounds that the ICPR is collaterally estopped from asserting that Plaintiff was terminated for legitimate, non-discriminatory reasons. For the reasons set forth below, the court **DENIES** the ICPR’s Motion for Summary Judgment and **DENIES** the Plaintiff’s Motion for Partial Summary Judgment.

I. Facts

A. Background

1. Plaintiff has cerebral palsy and is significantly limited in the use of his hands. In fact, he has virtually no use of his right hand and performs manual tasks in a slow and deliberate manner. (Deposition of Brian Taylor (“Taylor Dep.”) at 17; Deposition of William Vanes (“Plaintiff Dep.”) at 43; Complaint ¶ 4). Plaintiff is also limited in his ability to walk and speak. (Taylor Dep. at 19-20).
2. After acquiring training from Goodwill Industries, Plaintiff went to work for the ICPR in 1983 as a microfilmer. (Plaintiff Dep. at 14).
3. Plaintiff’s supervisor at all relevant times was Brian Taylor (“Taylor”). (Taylor Dep. at 20).
4. Taylor was aware of Plaintiff’s limitations and admitted that he knew that Plaintiff was much slower in his ability to perform manual tasks than the other ICPR employees. (*Id.* at 25).
5. In fact, Taylor did not require Plaintiff to meet quotas – i.e., 150-200 images per hour – prior to October 2005. (Plaintiff Dep. at 42, 62-63; Taylor Dep. at 55).
6. At all relevant times, Plaintiff’s job involved filming books from the state archives. Plaintiff testified that it was difficult to meet an image quota because working with old documents required extra care. “The pages were brittle and you had to use extra care of handling these books. Most of them was really falling apart.” (Plaintiff Dep. at 76; *see also* Plaintiff Dep. at 41, 43).

B. Plaintiff’s Job Performance

7. Plaintiff generally performed his job well¹ from 1983 to 2005.
8. On January 9, 2004, Taylor filled out an Employee Appraisal Report on Plaintiff that reads as follows:

Bill has been with the Commission on Public Records/Micrographics Lab for a little over twenty (20) years now. Bill has done everything from processing film (on one of the old film processors) to microfilming Archival records to training new employees. Bill's knowledge in microfilming is excellent, and I can always count on Bill for quality workmanship. Since Bill's last performance appraisal, he even filmed a project that was valued at over a million dollars (the John Dillinger records). Bill has always been a valuable asset to the lab.

(Plaintiff's Ex. 24).

9. James Corridan ("Corridan") became the Director of ICPR on August 15, 2005. Corridan made it clear that he was the "new sheriff in town" and that Taylor and the other ICPR supervisors needed to ensure that their subordinates were "living up to their position descriptions." (Taylor Dep. at 15-16). This meant that supervisors needed to start enforcing the quotas specified in their subordinates' job descriptions. (Plaintiff Dep. at 40)(testifying to his 2004 written job description which "indicates a quota or goal of 150 to 200 images per hour").

¹ The ICPR includes in its facts section criticism of Plaintiff's work production and overlong coffee breaks which allegedly occurred between 1988-1992. (*See* Plaintiff Dep. at 63-66). The record is silent from that time to and including 2004. The court finds that the 1988-1992 criticisms are too remote in time and are immaterial.

C. Plaintiff Is Unable to Meet His Quota

10. In Plaintiff's last Employee Appraisal Report, dated October 3, 2005, Taylor wrote:

Bill has been with ICPR/Micrographics since 1983. Bill's knowledge of microfilming and quality of work is excellent. Bill has an excellent working knowledge of the cameras that he operates and he takes great care to insure that his work is the best quality possible.

There is one area that I would like Bill to concentrate on and improve. Bill's productivity level is well below division standards. Division Standards for 35 mm cameras are 150-200 images per hour. Bill needs to spend more time filming and less time concentrating on his personal items . . . (taking care of personal bills, cutting his finger nails, too many coffee breaks, eating after lunch hour). If Bill would concentrate on his job, I know his image count would increase. Over the past few weeks, Bill's daily average has only been about 42 images per hour.

I would like Bill to concentrate and improve on his daily counts and I will review this again in 3 months. (January 2006).

(Plaintiff Ex. 25).

11. As Plaintiff's supervisor, Taylor had the authority to set an image "yearly goal" for Plaintiff. (Taylor Dep. at 31). Thus, on October 26, 2005, Taylor gave Plaintiff his "Yearly Goal." Plaintiff was asked to sign a form which states, "I, William Vanes, have been told, and understand that my yearly image goal for fiscal year 2005/2006 is 129,150." (Plaintiff Ex. 27²). Taylor testified that this yearly image goal equated to 75 image scans per hour. (Taylor Dep. at 29).
12. On November 8, 2005, Plaintiff was reprimanded for failing to meet his 75 image scans per hour quota and for having "no image count for 2 hours" on the previous day, which Taylor found "unacceptable." (Defendant's Ex. 18).

² The court was unable to locate this exhibit from Plaintiff's designated evidence. However, because the ICPR did not pose an objection to the introduction of the exhibit, the court will consider it for purposes of this motion.

13. Around this time frame, Plaintiff improved his hourly image scan rate from 42 image scans per hour to approximately 65 image scans per hour. (Taylor Dep. at 35-36; Plaintiff Dep. at 54).
14. Taylor testified that Plaintiff could have met his goal if he had performed his job duties to the best of his ability. Taylor testified that impairing Plaintiff's productivity were long coffee breaks and his engagement in other non-work related activities such as paying his personal bills, reading magazines, and talking on the phone. (Affidavit of Brian Taylor ¶¶ 14-15, 17).

D. Plaintiff Is Suspended and Eventually Terminated for Failing to Meet His Quota

15. On November 28, 2005, Taylor issued Plaintiff a one-day suspension without pay for failing to meet his 75 image scan per hour quota. (Defendant's Ex. 29).
16. On December 29, 2005, Taylor issued Plaintiff a document entitled "Daily Quota," which increased his quota to 150 image scans per hour. Taylor warned that the failure to meet this goal could result in further disciplinary action up to and including dismissal. (Plaintiff's Ex. 20).
17. Plaintiff testified that he was able to meet this quota approximately 50 percent of the time. (Plaintiff Dep. at 54).
18. On January 20, 2006, Plaintiff was suspended without pay for five days for failing to meet his new image scan quota. Taylor again warned Plaintiff of the consequences of failing to meet this quota. (Defendant's Ex. 21).
19. Plaintiff returned to work on January 30, 2006, but his stay was short-lived. On February 10, 2006, he was suspended for 30 days pending termination effective March 13, 2006.

In the termination document, the ICPR claimed that Plaintiff “was capable of meeting hourly and daily quotas” but was fired for his “continued failure to meet performance expectations” and a “continued unwillingness to perform the essential functions” of his position. (Defendant’s Ex. 22).

20. Prior to Plaintiff’s termination, Corridan, Taylor, and Jeff Sullivan from the State Personnel Office met on several occasions to discuss the appropriate “paper trail” to comply with ICPR’s disciplinary procedures for termination. (Taylor Dep. at 26, 58-59). Alternatives in lieu of termination were not discussed. (*Id.* at 58-59).

E. Requests for Accommodations

21. Taylor testified that the ICPR did not have a job bidding system and that, in 2005, he had the authority to move employees to work on different machines. (*Id.* at 22).
22. First, as noted above, Taylor set Plaintiff’s quota to 75 image scans per hour, but, just two months later, changed Plaintiff’s hourly scan quota to 150 image scans per hour. Plaintiff testified that he asked Taylor for several accommodations.
23. Plaintiff’s second request was to “edit” film “to give [him] a break.” (*Id.* at 49). Plaintiff testified that the editing position was a position that “anybody,” on any given day or week, may be assigned to. (*Id.* at 50).
24. Taylor allowed Plaintiff to edit film, but later “pulled [Plaintiff] off the job” because he could not keep up with the quota. (*Id.* at 49-51).
25. Finally, he asked that he be trained and reassigned to work with an automated Canon 5060 camera “a couple of times,” the last time being “right before [he] got dismissed.” (Plaintiff Dep. at 46-48). According to Plaintiff, working with an automated camera

would have increased his productivity because “the camera does the job” in that “all you had to do was feed the documents through the camera.” (*Id.* at 48).

26. The ICPR had two automated Canon 5060 cameras located in its office. One was purchased by the Indiana Public Employees Pension Fund (“PERF”) specifically for PERF records. (30(b)(6) Deposition of Brian Taylor (“30(b)(6) Dep.”) at 23). Thus, that camera was operated by a PERF employee. (*Id.*). The second automated Canon 5060 camera was run by two ICPR employees. (*Id.* at 22-23).
27. The quota on the automated machine was roughly 700-800 image scans per hour. (30(b)(6) Dep. at 23).
28. Plaintiff was never trained or reassigned to an automated Canon 5060 camera. (Plaintiff Dep. at 46).

F. Unemployment Benefits

29. Plaintiff applied for unemployment benefits with the Indiana Workforce Development Agency. (Plaintiff's Ex. 33).
30. ICPR challenged Plaintiff's application for unemployment benefits and claimed that it terminated Plaintiff from his employment for cause. (*Id.*).
31. On the first day of the hearing, August 14, 2006, the ICPR was represented by Amy Matthews ("Matthews") in her capacity as Dispute Resolution Director for the Indiana Personnel Department. (Affidavit of Amy Matthews ("Matthews Aff.") ¶ 1, 4; Plaintiff's Ex. 33).
32. Matthews was not an attorney at that time. (Matthews Aff. ¶ 2).
33. Matthews left her position as Dispute Resolution Director before the hearing resumed on October 16, 2006. (*Id.* ¶ 6).
34. Tamika Henderson ("Henderson") replaced Matthews as Dispute Resolution Director and represented the ICPR at the hearing on October 16, 2006. (Affidavit of Tamika Henderson ("Henderson Aff.") ¶¶ 1, 4).
35. Henderson was a licensed attorney; however, having a law degree was not a prerequisite for her position. (*Id.* ¶ 5).
36. After a two-day hearing, Administrative Law Judge Joseph L. Kivett concluded that "the employer did not discharge claimant for a just-cause reason under the Act and, therefore, concludes that the claimant was not discharged by employer from his employment for just cause under Chapter 15, Section 1(a) of the Act." (Plaintiff's Ex. 33).

II. Summary Judgment Standard

Summary judgment is proper only if the record shows “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.” Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is “material” if it is outcome determinative. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is “genuine” where the evidence “is such that a reasonable jury could return a verdict for the non-moving party.” *Id.*

In determining whether a genuine issue of material fact exists, the court must view the record and all reasonable inferences in the light most favorable to the non-moving party. *National Soffit & Escutcheons, Inc. v. Superior Systems, Inc.*, 98 F.3d 262, 264 (7th Cir. 1996). While the moving party bears the burden of demonstrating the “absence of evidence on an essential element of the non-moving party’s case,” *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986), the non-moving party may not simply rest on the pleadings, but “must affirmatively demonstrate by specific factual allegations that a genuine issue of material fact exists for trial.” *Id.* If the non-moving party fails to make a sufficient showing on an issue for which he has the burden of proof, the moving party is entitled to judgment as a matter of law. *Ripberger v. Western Ohio Pizza, Inc.*, 908 F.Supp. 614, 617 (S.D. Ind. 1995) (*citing Celotex Corp.*, 477 U.S. at 323). “If, however, doubts remain as to the existence of a material fact, then those doubts should be resolved in favor of the non-moving party and summary judgment denied.” *Wolf v. City of Fitchburg*, 870 F.2d 1327, 1330 (7th Cir. 1989).

III. Motion for Summary Judgment

The ICPR moves for summary judgment on two grounds: (1) the ICPR is immune from suit under the principles of sovereign immunity; and (2) that there is no genuine issue of material

fact with respect to Plaintiff's Rehabilitation Act claims. The court will begin its discussion with the threshold issue of whether the ICPR is immune from suit.

A. Sovereign Immunity

The ICPR argues that it is immune from suit under the principles of sovereign immunity. In support of this claim, ICPR cites the court to *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001), where the Court concluded that states retain their sovereign immunity on claims brought under Title I of the ADA. The ICPR argues that since cases brought under the Rehabilitation Act are analyzed the same, that both should be treated the same for purposes of sovereign immunity. The ICPR is incorrect.

Plaintiff brings his claim under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), which protects a “‘qualified individual with a disability’ from discrimination solely because of his disability in any program receiving federal financial assistance.” *Branham v. Snow*, 392 F.3d 896, 902 (7th Cir. 2004) (quoting 29 U.S.C. § 794(a)). With respect to a state's sovereign immunity, Congress amended Section 504 in 1985 to provide that: “A state shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act.” 42 U.S.C. § 2000d-7(a)(1). Based upon this statute, the Fourth, Seventh, Eighth, Ninth, and Eleventh Circuits have all held that the Rehabilitation Act is enforceable against state agencies (and not necessarily the state itself) that receive federal financial assistance. *Stanley v. Litscher*, 213 F.3d 340, 344 (7th Cir. 2000) (“[T]he Rehabilitation Act is enforceable in federal court against recipients of federal largess.”); *Koslow v. Commonwealth of Pennsylvania*, 302 F.3d 161, 171 (3d Cir. 2002) (“[I]f a state accepts federal funds for a specific department or agency, it voluntarily waives sovereign

immunity for Rehabilitation Act claims against the department or agency – but only against that department or agency.”); *Jim C. v. Arkansas Dep’t of Educ.*, 235 F.3d 1079, 1082 (8th Cir. 2000) (“Arkansas waived sovereign immunity, with respect to suits under Section 504 against the Department of Education, when it chose to participate in the federal spending program created by that Section.”); *Litman v. George Mason Univ.*, 186 F.3d 544, 554 (4th Cir. 1999) (applying the same reasoning to Title IX suits); *Sandoval v. Hagan*, 197 F.3d 484, 493-94 (11th Cir. 1999) (applying the same reasoning to Title VI suits). The ICPR is a state agency and, for purposes of this motion, is a recipient of federal financial assistance. Accordingly, the court finds that the ICPR is subject to suit under the Rehabilitation Act.

B. Merits of Plaintiff’s Rehabilitation Act Claims

As noted above, employment discrimination claims brought under the Rehabilitation Act are subject to the same standards as claims brought under Title I of the Americans With Disabilities Act (“ADA”). 29 U.S.C. § 791(g); 29 C.F.R. § 1614.203(b); *Patmythes v. City of Janesville*, 181 Fed.Appx. 596, 598 (7th Cir. 2006); *Peters v. City of Mauston*, 311 F.3d 835, 842 (7th Cir. 2002); *Silk v. City of Chicago*, 194 F.3d 788, 798 n.6 (7th Cir. 1999). Thus, a plaintiff seeking protection under the Rehabilitation Act must first show that he is protected by the Rehabilitation Act – i.e., that he is a qualified individual with a disability. Once that is established, the plaintiff may show that he has been treated adversely because of his disability either by providing direct evidence or by proceeding under the indirect, burden-shifting method used in employment discrimination cases. *Timmons v. General Motors Corp.*, 469 F.3d 1122, 1126 (7th Cir. 2006) (ADA); *Herron v. DaimlerChrysler Corp.*, 388 F.3d 293, 299 (7th Cir.

2004) (race discrimination). In the case at bar, Plaintiff proceeds under both methods of proof. Before addressing Plaintiff's direct case, however, the court must first determine whether Plaintiff is entitled to the protections of the Rehabilitation Act – i.e., whether he is a qualified individual with a disability.

1. Qualified Individual

A “qualified individual with a disability” is defined by the ADA to mean “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). Although the parties do not address this issue, the parties agree that Plaintiff is disabled within the meaning of the Rehabilitation Act and that he was able to perform the essential functions of his position. (Whether he was provided with or otherwise entitled to an accommodation is in dispute and is addressed below). The court therefore finds that Plaintiff is a qualified individual with a disability entitled to the protections of the Rehabilitation Act. Accordingly, the court now turns to a discussion of Plaintiff's case analyzed under the direct method of proof.

2. Direct Method

Under the direct method, the plaintiff may show, either through direct or circumstantial evidence, that the employer's decision to take the adverse job action was based upon an impermissible purpose, such as race, sex, or disability. *Timmons v. General Motors Corp.*, 469 F.3d at 1126 (7th Cir. 2006); *Rhodes v. Ill. Dep't of Transp.*, 359 F.3d 498, 504 (7th Cir. 2004); *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 616 (7th Cir. 2000) (Direct evidence “essentially requires an admission by the decision-maker that his actions were based on the prohibited

animus.”); *see also Timmons v. General Motors Corp.*, 469 F.3d 1122, 1126 (7th Cir. 2006); *Tesch v. SBC Global Serv., Inc.*, 2008 WL 4874444, at *4 (N.D. Ill. June 26, 2008) (quoting *Timmons*, 469 F.3d at 1126)). When presenting a direct evidence case through the introduction of circumstantial evidence, as is the case here, the plaintiff must present a “convincing mosaic” of circumstantial evidence that “allows a jury to infer intentional discrimination by the decisionmaker.” *Hossack v. Floor Covering Ass. of Joliet, Inc.*, 492 F.3d 853, 862 (7th Cir. 2007) (quoting *Rogers v. City of Chicago*, 320 F.3d 748, 753 (7th Cir. 2003)).

There are three types of circumstantial evidence upon which a plaintiff can rely in support of a direct method case. The type of evidence most appropriate for Plaintiff’s case is evidence consisting of “suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn.” *Troupe v. May Dep’t Stores*, 20 F.3d 734, 736 (7th Cir. 1994).

The evidence in the light most favorable to the Plaintiff reflects that Plaintiff was, overall, an excellent employee for the ICPR from 1983 until the fall of 2005 and, significantly, not subject to an image scan per hour quota. When Corridan became Director of the ICPR in August 2005, he “wanted to make sure that everyone was living up to their position descriptions.” (Taylor Dep. at 16). Plaintiff’s 2004 job description noted that an ICPR employee in his position was required to complete 150-200 image scans per hour.

During this time frame, Plaintiff, who undisputably had the use of only one “good hand,” was scanning old books from state archives whose “pages were brittle” which required that he, as the microfilmer, “use extra care” in “handling these books” as “[m]ost of them was falling

apart.” (Plaintiff Dep. at 76). In apparent recognition that Plaintiff had trouble meeting his quota, on October 26, 2005, Plaintiff’s supervisor, Taylor, modified Plaintiff’s quota to 75 image scans per hour. Two weeks later, on November 8, 2005, Taylor reprimanded Plaintiff for failing to meet that goal and for being completely unproductive for a two-hour time span on November 7, 2005. At this time, Plaintiff had increased his productivity from 42 image scans per hour to 65 image scans per hour.

On November 28, 2005, Plaintiff was again reprimanded for failing to meet the 75 image scans per hour quota, and approximately one month later, his image scans per hour quota was increased to 150 image scans per hour goal. Plaintiff was ultimately terminated on February 10, 2006, for his “failure to meet performance expectations” – i.e., the 150 image scans per hour goal. Thus, in roughly a three-month time period – November through January – Plaintiff went from being a good employee to being fired for performance deficiencies.

The evidence also reflects that during the time frame noted above – November to January – Corridan, Taylor, and State Personnel Office employee, Jeff Sullivan, met on several occasions to discuss Plaintiff’s termination. (Taylor Dep. at 58-59). Corridan, Taylor, and Sullivan did not consider any other alternative to termination, such as a job reassignment. (*Id.* at 26). Rather, Sullivan discussed the importance of a paper trail to substantiate Plaintiff’s termination. (*Id.*).

The court finds that a reasonable jury could find that the ICPR terminated Plaintiff because of his disability. Indeed, the ICPR assigned Plaintiff to state archives, which required that he work with very old books – books that in some cases were literally falling apart. Such an assignment would set back an employee with two good hands, much less one, like the Plaintiff, who has the use of only one good hand. Because Plaintiff was not meeting his goal, Taylor

modified Plaintiff's goal to 75 image scans per hour for the year 2005-2006. Plaintiff showed improvement, but was not able to consistently meet the 75 image scans per hour goal.

Nevertheless, Taylor doubled Plaintiff's goal to 150 image scans per hour within a relatively short time span. Against the backdrop of this evidence is the testimony of Taylor that he, Sullivan and Corridan met on several occasions to discuss Plaintiff's termination and never considered other alternatives such as job restructuring or reassignment. This evidence, viewed in the light most favorable to the Plaintiff, could lead a reasonable jury to conclude that the ICPR was not willing to work with Plaintiff's disability and was looking for a reason to rid itself of a disabled employee who slowed down the process.

On the other hand, a reasonable jury could find that Plaintiff had the ability to meet his quota of 150 image scans per hour, but failed to do so because he did not put forth a sincere effort. To this end, the ICPR produced evidence that Plaintiff took longer than expected coffee breaks, paid his bills at his desk and engaged in other personal matters at his work desk during regular work hours. The court therefore finds that a material issue of fact remains for trial as to the real reasons for Plaintiff's termination. Defendant's Motion for Summary Judgment on Plaintiff's disparate treatment claim is therefore **DENIED**. Having so found, the court need not address Plaintiff's case under the indirect method of proof.

C. Failure to Accommodate

To state a claim for failure to accommodate under the Rehabilitation Act, a plaintiff must show that: (1) he is a qualified individual with a disability; (2) the employer knew of his disability; and (3) the employer failed to make a reasonable accommodation. *Bellino v. Peters*, 530 F.3d 543, 549 (7th Cir. 2008); *E.E.O.C. v. Sears, Roebuck & Co.*, 417 F.3d 789, 797 (7th

Cir. 2005). The ADA states that a “reasonable accommodation” may include “job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, . . . , training materials or policies, . . . ,and other similar accommodations for individuals with disabilities.” 42 U.S.C. § 12111(9)(B). An employer is excused from providing a reasonable accommodation if the employer can show that such an accommodation “would impose an undue hardship on the operation of the [employer’s] business.” 42 U.S.C. § 12112(b)(5)(A); *Amadio v. Ford Motor Co.*, 238 F.3d 919, 928 (7th Cir. 2001); *McWright v. Alexander*, 982 F.2d 222, 226 (7th Cir. 1992).

Here, the only issue in dispute is whether the ICPR failed to reasonably accommodate Plaintiff’s disability. In support of this claim, Plaintiff cites to several requests he made for accommodations. First, he cites to Taylor’s modification of his yearly goal in October 2005 to 75 image scans per hour. Taylor testified that he “agreed” to this change in his quota “as an accommodation.” (Taylor Dep. at 45). It is undisputed that Taylor later took that accommodation away and required Plaintiff to meet the 150 image scans per hour goal – a “division standard to which all similarly classified employees are held.” (Plaintiff’s Ex. 20). But the Plaintiff was not like all other “similarly classified employees;” he was significantly limited in his ability to perform manual tasks. Moreover, the ICPR has failed to provide evidence to show that modifying Plaintiff’s image scans per hour goal was an unreasonable accommodation or would otherwise create an undue hardship to the ICPR’s business. Accordingly, the court finds, given the evidence of record, that a reasonable jury could find that Taylor failed to reasonably accommodate Plaintiff’s disability when he took away his accommodation of 75 image scans per hour and replaced it with a requirement of 150 image

scans per hour.

Second, Plaintiff cites to his request that he be allowed to edit film. The record indicates that Plaintiff was given this opportunity but was later pulled off the job because he could not keep up with the quota. The ICPR is not required to reassign an employee to a position if the employee is not otherwise qualified for the position. *Gile v. United Airlines, Inc.*, 95 F.3d 492, 499 (7th Cir. 1996). Moreover, it is not clear from the record whether “editing film” was a permanent position to which one could be permanently reassigned. Plaintiff testified that “anyone” could do the job and that “[t]here might be a day, there might be a week – excuse me – they might put somebody else to edit the film.” (Plaintiff Dep. at 50). The court therefore finds that, with respect to this request, the ICPR satisfied its duty under the Rehabilitation Act.

Third, Plaintiff cites to his request that he be trained and reassigned to an automated camera. The ICPR had two automated Cannon 5060 cameras in its office; however, one was purchased specifically for PERF records and only employees of PERF were authorized to use that camera. (30(b)(6) Dep. at 23). Two ICPR employees were already assigned to the other automated camera. (*Id.* at 22-23). The Rehabilitation Act does not require “an employer to ‘bump’ other employees to create a vacancy so as to be able to reassign the disabled employee.” *Gile*, 95 F.3d at 499. However, Taylor testified that he had the authority to move employees to other positions – such as moving Plaintiff to the automated camera – but inexplicably, did not. In its Reply, the ICPR contends that reassigning Plaintiff to the automated camera was a futile request because there is no evidence that Plaintiff could meet the quota of 700-800 image scans per hour. However, because Plaintiff was never given the chance – indeed, never even given the training – such a response is speculative. The court therefore finds that a reasonable jury could

find that the ICPR failed to consider reassignment and training as a reasonable accommodation to Plaintiff. Defendant's Motion for Summary Judgment on Plaintiff's failure to accommodate claim is therefore **DENIED**.

IV. Motion for Partial Summary Judgment

Plaintiff moves for partial summary judgment on the ICPR's affirmative defense that it had a legitimate, non-discriminatory reason to terminate Plaintiff's employment. Specifically, Plaintiff contends that the issue was fully litigated before the Indiana Department of Workforce Development Unemployment Insurance Appeals, that Plaintiff prevailed based upon the ALJ's finding that Plaintiff was not terminated for just cause, and that therefore, the ICPR is collaterally estopped from relitigating the issue.

"[C]ollateral estoppel applies where a particular issue is adjudicated and then put in issue in a subsequent suit on a different cause of action between the same parties or their privies." *McClanahan v. Remington Freight Lines, Inc.*, 517 N.E.2d 390, 394 (Ind. 1988). In determining whether administrative collateral estoppel applies, the court considers the following factors: (1) whether the issues sought to be estopped were within the statutory jurisdiction of the agency; (2) whether the agency was acting in a judicial capacity; (3) whether both parties had a fair opportunity to litigate the issues; and (4) whether the decision of the administrative tribunal could be appealed to a judicial tribunal. *Id.* In addition, there are two implicit requirements: (1) that the parties be the same and (2) that the issues sought to be barred are the same. *Spearman v. Delco Remy Division of General Motors Corp.*, 717 F.Supp. 1351, 1357 (S.D. Ind. 1989).

Two cases cited by the parties are instructive. In *McClanahan, supra.*, the plaintiff

claimed he had been fired from his position as an interstate truck driver for refusing to perform an illegal act (carrying an overweight load on Illinois highways). 517 N.E.2d at 391. The plaintiff applied for unemployment benefits and, following a hearing to determine the plaintiff's entitlement to benefits, the ALJ found that the plaintiff was not terminated for just cause. *Id.* The plaintiff's employer, Remington Freight Lines, did not appeal the decision. *Id.* The plaintiff subsequently sought to use the doctrine of collateral estoppel in his lawsuit for wrongful discharge. *Id.*

In rejecting the application of collateral estoppel, the Court recognized that the unemployment review process is "a procedure designed for quick and inexpensive determinations of unemployment benefits. Recognizing it as a basis for collateral estoppel might well force the parties to convert such proceedings into longer and more expensive ones." *Id.* at 395. In reaching this conclusion, the Court noted that neither side was represented by counsel, cross-examination was limited and ineffective, and potentially inadmissible hearsay evidence was considered. *Id.*

By contrast, in *Uylaki v. Town of Griffith*, 878 N.E.2d 412 (Ind. Ct. App. 2007), the plaintiff, a truck driver employed by the Town of Griffith, was terminated for substance abuse issues. *Id.* at 413. In proceedings before the ALJ, the ALJ determined that the employer had just cause for terminating the plaintiff. *Id.* at 413-14. In applying collateral estoppel principles to bar the plaintiff's subsequent wrongful discharge claim, the Indiana Court of Appeals distinguished the *McClanahan* opinion by stating that in the plaintiff's case, both sides were represented by counsel and had an opportunity to call and cross-examine witnesses and introduce exhibits. *Id.* at 414-15.

In the present case, the evidence reflects that Matthews, who represented the ICPR on the first day of Plaintiff's two-day hearing in her capacity as Dispute Resolution Director, was not a lawyer. Moreover, there is no evidence in the record as to whether the only witness in the proceedings, Taylor, was subject to a vigorous cross-examination or whether the rules of evidence were strictly enforced. Indeed, as noted by the *McClanahan* Court, unemployment hearings are "designed for quick and inexpensive determinations of unemployment benefits." 517 N.E.2d at 395. Thus, even though Matthews appeared in a representative capacity on behalf of the ICPR, the court finds that the issue sought to be barred – i.e., the basis for Plaintiff's termination – was not fully litigated.

Moreover, the court is not convinced that the issue before the ALJ is the same issue raised in this court. The ALJ merely determined, in a perfunctory fashion, that the "employer did not discharge claimant for a just-cause reason under the Act." (Plaintiff's Ex. 33). The ALJ's opinion does not adequately explain why he came to that conclusion. Thus, this court cannot say, as a matter of law, that the ALJ's finding that the Plaintiff was not terminated for a just-cause reason has preclusive effect in this employment discrimination action, in which the ultimate issue is whether Plaintiff was terminated because of his disability. Accordingly, Plaintiff's Motion for Partial Summary Judgment is **DENIED**.

V. Conclusion

For the reasons explained above, the court **DENIES** Defendant's Motion for Summary Judgment (Docket # 54) and **DENIES** Plaintiff's Motion for Partial Summary Judgment (Docket # 57).

SO ORDERED this 2nd day of April 2009.

s/ *Richard L. Young*
RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

Electronic Copies to:

Laura Lee Bowker
OFFICE OF THE INDIANA ATTORNEY GENERAL
laura.bowker@atg.in.gov

Robert Peter Kondras Jr.
HUNT HASSLER & LORENZ LLP
kondras@huntlawfirm.net