UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

TERESA M GRIGGS,

Plaintiff,

v. Case No. 20-cv-1713-bhl

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS LOCAL 494,

Defendant.

ORDER GRANTING SUMMARY JUDGMENT

At the start of the COVID-19 pandemic, Plaintiff Teresa Griggs worked as an accountant for Local 494 of the International Brotherhood of Electrical Workers ("the Union"). ECF No. 54 at 1, 3. After Wisconsin Governor Tony Evers issued his "Safer at Home Order,"[1] directing that "Essential Businesses and Operations [including labor unions] shall, to the greatest extent possible, use technology to avoid meeting in person, including virtual meetings, teleconference, and remote work (i.e., work from home)," Griggs emailed her supervisor, Dean Warsh, to inform him she would be working from home starting that day, March 27, 2020. ECF No. 1 at 5; ECF No. 59 at 6–7. Griggs attached a note from her doctor stating that she was at higher risk of complications from COVID-19 because of her asthma. *Id.* at 6–7. Neither Warsh nor anyone else at the Union ever formally responded to Griggs' request that she work remotely. *See* ECF No. 54 at 3–6. Instead, Griggs and Warsh exchanged emails over the following weeks, with Griggs reporting that she was self-quarantining and Warsh asking when she anticipated returning to work. *See id*. Griggs never answered Warsh's question directly, and her employment status became unclear. *See id.* at 9–10. She never returned to work, but never formally quit and was never formally fired. ECF No. 54 at 9–10; ECF No. 59 at 12–14.

[1] *See* Emergency Order #12 (March 24, 2020), STATE OF WISCONSIN DEPARTMENT OF HEALTH SERVICES, https://evers.wi.gov/Documents/COVID19/EMO12-SaferAtHome.pdf.

On May 6, 2020, less than six weeks after her initial email, Griggs filed an EEOC complaint against the Union, alleging failure to accommodate, retaliation, and discrimination on the basis of disability, sex, and race. ECF No. 1 at 2; ECF No. 54 at 6. After receiving a right-to-sue letter from the EEOC, Griggs filed a six-count complaint in this Court. ECF No. 1. The complaint asserts claims for: (I) failure to accommodate under the ADA; (II) race discrimination under Title VII and 42 U.S.C. § 1981; (III) sex discrimination under Title VII and 42 U.S.C. § 1981; (IV) retaliation under the ADA, Title VII, and 42 U.S.C. § 1981; (V) punitive damages; and (VI) interference with employee benefits under the Employee Retirement Income Security Act (ERISA). ECF No. 1 at 8–13. The Union answered and, after conducting discovery, moved for summary judgment on all claims. The motion has been fully briefed since January 15, 2022. *See* ECF No. 58. For the reasons given below, the Court grants the motion and dismisses the case.

FACTUAL BACKGROUND

Griggs began working as an accountant for the Union in 2012. ECF No. 54 at 1. In this role, she was responsible for the Union's accounts and records, and her duties included preparing reports, issuing payroll and accounts payable, maintaining personnel records, purchasing supplies, answering phones when secretaries were unavailable, training temporary employees on the Union's accounting software, handling general and confidential correspondence, and acting as a cashier for dues payments. *Id.* at 2. The vast majority of Griggs' job responsibilities (about 90 percent) involved usage of a business management software program called Sage. ECF No. 54 at 6; ECF No. 55-1 at 88. The Union maintains this software on a physical hard drive at the Union's offices in Milwaukee. ECF No. 54 at 6–9. Although it has no written policy on the issue, the Union has never allowed remote server access to the information or electronic records in Sage to anyone other than an IT consultant. ECF No. 54 at 10; ECF No. 56-2 at 9–10, 28. It insists this is part of a long-standing unwritten policy relating to cybersecurity concerns, ECF No. 54 at 8; the Union's electronic records include the social security numbers and bank information of more than 2,000 members. *Id.* at 2. The Union does not allow any of its office staff to work remotely. ECF No. 54 at 8; ECF No. 59 at 24, 27. When the Union has allowed business representatives to work remotely, those workers were not allowed to access the Union's hard drive remotely. ECF No. 54 at 8–9.

In addition to using Sage, some of Griggs' other responsibilities also required her to work in the office. Whenever a secretary was not available, Griggs was responsible for assisting union

members who came in person to pay their dues. ECF No. 55-1 at 22, 25. Her payroll duties involved printing paper checks, voiding them, and providing them to the Union's president and treasurer for sign-off. ECF No. 55-1 at 26–28. Griggs was also responsible for paying on average 15–20 invoices per week, at least some of which came in the mail. ECF No. 55-1 at 30–31, 37. She usually did so by writing physical checks, providing them to the president and treasurer for approval, and then mailing them. ECF No. 55-1 at 31, 89.

On the morning of Friday, March 27, 2020, Griggs emailed Dean Warsh, her supervisor and the business manager for the Union. ECF No. 54 at 3. Her email stated:

> **Hi Dean,**
>
> During these trying times, it's imperative for us all to protect our health and mental well-being. With the increasing numbers of positive cases/deaths of the COVID-19. It will be in my best health interest to compel to the {State order #12 Safer-at-Home Act} in an effort to decrease my chances of exposure of the COVID-19 for myself and others.
>
> Please find my documentation attach. Effective Friday 27th, would be my first {Safer-at-Home}. please advise what I can / if anything, assist with remotely.
>
> Best regards,
> Teresa Griggs

ECF No. 33 at 1 (text preserved). Attached to the email was a PDF of a note from her doctor, Dr. Matthew M. Richlen, stating that Griggs was under his medical care and had "a history of exercise-induced asthma," putting her "at higher risk of complications if she contracts COVID-19." *Id.* at 3.

Later on March 27, Griggs copied Warsh on an email that she sent to John Zapfel, the political director for the Union, sending some work she had completed on a Political Action Committee report and offering to assist him with finalizing the report. ECF No. 55-1 at 86, 90–92; ECF No. 56-1 at 26. Warsh did not respond, later explaining that the email was primarily intended for Zapfel and that the report could not be completed without access to the hard drive in the Union's office. ECF No. 56-1 at 26.

The following Monday, March 30, Griggs emailed Warsh again, telling him she would not be in the office that day and asking if he needed her to fill out any documentation. ECF No. 38 at 1. Warsh responded later that day, thanking Griggs for "keeping in touch," expressing

understanding for her decision to stay home "during these unprecedented times," and directing her to let him know when she had an anticipated return date so he could make sure the office was staffed adequately to service Union members. ECF No. 39 at 1. Griggs later spoke with her union representative, Dave Rehberg, who told her that Warsh had told him she could not work remotely because of the information she worked with in her job. ECF No. 59 at 9–10; ECF No. 55-1 at 142–43.

Griggs and Warsh continued to exchange emails over the following week, but Griggs' request to work remotely was never resolved. For example, on March 31, Griggs sent two emails to Warsh enclosing payroll forms for two different Union employees for Warsh's review. ECF No. 56-1 at 29–30. Warsh did not respond to either email. *Id.* On Friday of that week, April 3, Warsh emailed Griggs, wished her well, informed her of a new cell phone policy, and again asked about her anticipated return date. ECF No. 40 at 1. Later that day, Griggs replied, indicating she was reaching out to her doctor and would advise him once she heard back. ECF No. 37 at 1. Griggs emailed Warsh again the following week, stating that she was "[c]urrently" under a doctor's care and attaching a doctor's note that stated Griggs was under his medical care for a "respiratory illness" and would "need to self quarantine until 3 days after symptoms resolve." *Id.* at 1–2.

Warsh did not immediately respond, but five days later, on April 13, he emailed Griggs to discuss her attendance on a conference call scheduled for April 16. ECF No. 41 at 1. Warsh began by wishing Griggs well during her quarantine and then told her about the conference call, which concerned outstanding tasks for an audit and an LM report. *Id.* Griggs' job responsibilities included preparing the LM report. ECF No. 54 at 5. Warsh expressed understanding that Griggs could not be at the office and thus would not have "everything in front of [her]," but said he needed her to call in to get her insights. ECF No. 41 at 1. He indicated she would be paid for taking part. *Id.* Griggs did not respond to the April 13 email and did not join the conference call. ECF No. 54 at 5.

When Griggs did not call in for the conference call, Warsh emailed her one last time. ECF No. 41 at 2. He noted his need to have her on the call and her failure to call in or to notify him that she was unavailable. *Id.* He directed that she call him "no later than end of the day of Wednesday, April 22nd to discuss the reason" she failed to attend the conference call and "to reschedule the conference call with our accountants and myself." *Id.*

On April 22, Griggs emailed Warsh twice, and the two traded phone calls. ECF No. 41 at 3; ECF No. 56-1 at 34. In her emails Griggs noted, among other things, that she had not received "any payroll" since April 1 and asked if it was an "oversight" and when she could expect to be paid. ECF No. 41 at 3. Warsh testified that he received a phone call from Griggs and tried to call her back, but after playing "phone tag for a while" the two never connected. ECF No. 56-1 at 34. In fact, they did not speak again—over the phone, via email, or in person. ECF No. 54 at 6. Warsh acknowledges he had some responsibility for the communication breakdown. ECF No. 56-1 at 34.

On May 6, Griggs filed an EEOC complaint against the Union, alleging failure to accommodate, retaliation, and discrimination on the basis of disability, sex, and race. ECF No. 54 at 6. The next day, Warsh faxed a letter to Griggs' doctor, Matthew Richlen, asking for information about Griggs' quarantine and whether she had been tested for or was receiving treatment related to COVID-19. ECF No. 42 at 3. Richlen did not respond to the fax, but discussed it with Griggs during a telephone appointment three days later, on May 29. ECF No. 54 at 6. Griggs told the doctor not to respond to Warsh because she would do so herself. *Id.* She never did so. *Id.*

Griggs never returned to work. *See* ECF No. 54 at 9–10. Her employment status was unclear. At that time of her March 27, 2020 email, she had no remaining paid sick or vacation days. *See id.* The Union never told her she was on unpaid leave, and she never requested unpaid leave. ECF No. 54 at 9; ECF No. 59 at 12–13. She also never formally quit and was never formally fired, although she lost access to her work email sometime after she stopped coming into work. ECF No. 54 at 9–10; ECF No. 59 at 12–14. Warsh considered her to have effectively abandoned her position. ECF No. 59 at 12–14.

SUMMARY JUDGMENT STANDARD

"Summary judgment is appropriate where the admissible evidence reveals no genuine issue of any material fact." *Sweatt v. Union Pac. R. Co.*, 796 F.3d 701, 707 (7th Cir. 2015) (citing Fed. R. Civ. P. 56(c)). Material facts are those under the applicable substantive law that "might affect the outcome of the suit." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of "material fact is 'genuine' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* If the parties assert different views of the facts, the Court must view the record in the light most favorable to the nonmoving party. *E.E.O.C. v. Sears, Roebuck & Co.*, 233 F.3d 432, 437 (7th Cir. 2000).

ANALYSIS

I. Griggs Has Abandoned Counts II–VI by Ignoring Them in Her Summary Judgment Response Brief.

The Union seeks summary judgment on all counts in Griggs' complaint. ECF No. 27. On Counts I and II, the Union argues, among other things, that Griggs is not a "qualified individual" under the ADA, that she did not participate in an interactive process to determine a reasonable accommodation, and that she has produced no evidence of an adverse action or that similarly situated individuals were treated differently than her. *Id.* at 5–17. On the Count III sex discrimination claim, the Union argues Griggs has failed to show that she suffered an adverse employment action based on her sex. *Id.* at 17–23. For Count IV, the Union argues that Griggs is improperly trying to transform her failure-to-accommodate claim into a retaliation claim but without identifying any statutorily protected activity or any adverse employment action apart from the alleged failure to accommodate. *Id.* at 24–26. Finally, the Union argues Griggs' ERISA claim is meritless because, among other things, she does not identify a welfare plan or program established by the Union or a specific violation of ERISA, and because she was never actually fired—let alone fired under circumstances raising questions about retaliatory intent. *Id*. at 26–29.[2]

Griggs' opposition brief is focused almost exclusively on her ADA failure-to-accommodate claim. Other than a brief argument that she suffered an adverse employment action, she offers no response to the Union's arguments on Counts II–VI. ECF No. 52. She has therefore waived any arguments in response to the Union's arguments and is deemed to have abandoned her claims relating to those counts. "When a party raises arguments for summary judgment on various claims, the nonmoving party must respond to the movant's arguments as to each claim." *Zember v. Ethicon, Inc.*, No. 20-CV-369-JPS, 2021 WL 1087041, at *3 (E.D. Wis. Mar. 22, 2021) (citing *Nichols v. Mich. City Plant Plan. Dep't*, 755 F.3d 594, 600 (7th Cir. 2014)). "The non-moving party waives any arguments that were not raised in its response to the moving party's motion for summary judgment." *Id.* "In other words, when the nonmovant fails to respond to the movant's arguments, the nonmovant 'abandon[s] [their] claim and summary judgment will be granted for the [movant].' " *Id.* (citing *Watt v. Brown County*, 210 F. Supp. 3d 1078, 1083 (E.D. Wis. 2016); *Laborers' Int'l Union of N. Am. v. Caruso*, 197 F.3d 1195, 1197 (7th Cir. 1999)).

[2] The Union does not address Griggs' Count V, but Count V is a request for punitive damages, which is a mere remedy that Griggs has mislabeled as its own cause of action. *See* ECF No. 1 at 12–13.

The record shows that the Union has put forward a set of undisputed facts and arguments sufficient to support summary judgment in its favor on Counts II–VI of Griggs' complaint. There is no evidence Griggs was denied an accommodation on the basis of a disability, her sex, or her engagement in a statutorily protected activity; and no evidence that the Union interfered with any of Griggs' employment benefits in violation of ERISA. ECF No. 27 at 15–28; ECF No. 54; ECF No. 59. These are all necessary elements of Griggs' claims as alleged in those counts of the complaint. Because Griggs has offered no argument that she can support the required proof on those claims, the Union's motion is unopposed with respect to those counts and will be granted.

II. Griggs' Failure-to-Accommodate Claim Fails Because She Does Not Show That She Is a Qualified Person with a Disability.

Griggs' opposition brief focuses on trying to save her failure-to-accommodate claim under the ADA. "A claim for failure to accommodate under the ADA (and the Rehabilitation Act, generally) requires proof (1) plaintiff was a qualified individual with a disability; (2) defendant was aware of his disability; and (3) defendant failed to accommodate his disability reasonably." *Scheidler v. Indiana*, 914 F.3d 535, 541 (7th Cir. 2019) (emphasis removed) (citing *E.E.O.C. v. AutoZone*, 809 F.3d 916, 919 (7th Cir. 2016); *Brumfield v. City of Chicago*, 735 F.3d 619, 630 (7th Cir. 2013)).

The Union argues it is entitled to summary judgment on Griggs' failure-to-accommodate claim because, among other things, the undisputed facts show Griggs was not a "qualified individual with a disability" within the meaning of the ADA. ECF No. 27 at 6–7; ECF No. 58 at 2–10. The ADA defines a "qualified individual" as "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). The Seventh Circuit has interpreted this definition to entail a two-step analysis—whether the individual has the basic qualifications for the position, and whether the individual can perform the essential functions of the position with or without a reasonable accommodation. *Conners v. Wilkie*, 984 F.3d 1255, 1261 (7th Cir. 2021).[3]

[3] It is far from clear that Griggs' asthma qualifies as a disability in the context of this case. Under the ADA, a disability is "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(2). The Union does not raise any argument that Griggs' asthma, which put her at higher risk of severe illness due to COVID-19 according to her doctor, fails to qualify as a disability under the ADA. The EEOC has issued guidance that individuals can request reasonable accommodation under the ADA if they have medical conditions identified by the CDC as putting a person at "higher risk" for severe illness from COVID-19. *See* "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Law," Section G-3 (issued April 9, 2020; updated December 20, 2021), U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/wysk/what-you-

The Union does not challenge whether Griggs satisfies the first step; it focuses its arguments on the second.

The Union insists it is undisputed that Griggs cannot perform the essential functions of her position with or without her requested accommodation—i.e., working from home—because Griggs' job required her to work from the Union office. ECF No. 27 at 6–7; ECF No. 58 at 3–8. The Union first points out that Griggs' job required her to use the Sage software system, which is accessible solely from the Union's office and not remotely. ECF No. 27 at 6–7; ECF No. 58 at 6–8. It also argues that at least some of the remaining 10 percent of Griggs' duties that were unrelated to Sage required her to be in the office. ECF No. 58 at 3–6.

"When defining a job's essential functions, 'consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description . . . for the job, this description shall be considered evidence of the essential functions of the job.' " *Bilinsky v. Am. Airlines, Inc.*, 928 F.3d 565, 569 (7th Cir. 2019) (citing 42 U.S.C. § 12111(8)). "Although [courts] look to see if the employer actually requires all employees in a particular position to perform the allegedly essential functions, . . . [courts] do not otherwise second-guess the employer's judgment in describing the essential requirements for the job." *DePaoli v. Abbott Lab'ys*, 140 F.3d 668, 674 (7th Cir. 1998) (citations omitted). The presumption is that "an employer's understanding of the essential functions of the job is correct, unless the plaintiff offers sufficient evidence to the contrary." *Gratzl v. Off. of Chief Judges of 12th, 18th, 19th, & 22nd Jud. Cirs.*, 601 F.3d 674, 679 (7th Cir. 2010). *See also Ramos v. Cont'l Auto. Sys. Inc*, No. 18-CV-1900-BHL, 2021 WL 5866724, at *2 (E.D. Wis. Dec. 10, 2021).

While Griggs nominally disputes that the Union has a long-standing policy of requiring any employee who uses Sage to do so by using the hard drive located at the Union's office, she has not come forward with any evidence sufficient to create a genuine factual dispute on the issue. ECF No. 54 at 8; ECF No. 56-2 at 9–10, 28; ECF No. 59 at 24, 27. Her own conclusory assertions to the contrary are insufficient. Indeed, the only evidence in the record on the issue

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should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws. Current CDC guidance indicates that there is "mixed evidence" whether asthma puts an individual at higher risk for severe illness from COVID-19; it is not immediately clear to the Court whether the CDC considered asthma a high-risk factor for COVID-19 in March 2020. *See* "Underlying Medical Conditions Associated with Higher Risk for Severe COVID-19: Information for Healthcare Professionals" (updated February 15, 2022), CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-care/underlyingconditions.html. In any case, for the purposes of this analysis, the Court assumes without deciding that Griggs' asthma was a physical impairment that substantially limited her ability to go into work, and for which she could request a reasonable accommodation.

confirms that the Union has always followed this practice for its employees, and has turned down at least one other employee who requested remote access to Sage. ECF No. 54 at 10. Thus, for Griggs to perform the essential functions of her job, the vast majority of which (90 percent) involves using Sage, she must work from the Union's office.

Griggs argues that the Union could deviate from this policy by moving its records and software to a cloud-based system and thus allow her to work from home. ECF No. 52 at 8–14. The Union rejects this suggestion, explaining that it does not want to move to a cloud-based system because of cybersecurity concerns. ECF No. 58 at 6–8. Consistent with the Seventh Circuit's directives, the Court will not second-guess the Union's determination of the essential functions of Griggs' job, or, more specifically, that those functions require her to be in the Union office to access the Sage software. The Union's explanation of its policy is reasonable and has not been rebutted or shown to be invented. It is not this Court's job to override the Union's judgment on the importance of its policy by closely interrogating whether it is the best policy or even a good policy for promoting the Union's cybersecurity. *See DePaoli*, 140 F.3d at 674.

Moreover, even assuming for the sake of argument that the Union did not have an established policy about how its employees could access Sage, or that the Union in fact had a policy that employees *could* access Sage from home, Griggs' failure-to-accommodate claims would still fail because it is undisputed that the remainder of her non-Sage essential functions would still require her to go into the office. As an accountant, Griggs was responsible for assisting union members who came in person to pay their dues. She also had to print paper checks, void them, and provide them to the Union's president and treasurer for sign-off. She was required to process about 15–20 invoices per week, some of which arrived via post. This involved writing physical checks, providing them to supervisors for approval, and then mailing them. ECF No. 55-1 at 31, 89. While Griggs dismisses these duties as "marginal" under *Miller v. Illinois Dep't of Transp.*, No. 07-677-WDS, 2009 WL 779755, at *3–4 (S.D. Ill. Mar. 23, 2009), the circumstances here are much different. In *Miller*, the court determined that a work obligation that occurred "less than one-half percent of the time" was a marginal obligation and could not be used to deny employment opportunities to an individual who could otherwise manage the other 99.5 percent of the job's duties. *Id.* (citing *Duda v. Bd. of Educ. of Franklin Park Public Sch. Dist. No. 84*, 133 F.3d 1054, 1058 (7th Cir. 1998)). Griggs' non-Sage duties that require her to work in the office make up a much more significant percentage of her overall duties. Indeed, Griggs herself suggests

that her non-Sage, in-office duties make up a significant portion (about 10 percent) of her job responsibilities. ECF No. 52 at 12–13. This is enough to make it clear that she cannot perform the essential responsibilities of her job with the accommodation she requests. Moreover, to the extent Griggs suggests that some of her duties (handling in-person membership dues payments when the secretaries were not available) could be given to other employees, the Union is not required to accommodate her by making other employees do her work. "[T]o simply have another employee perform a position's essential function, and to a certain extent perform the job for the employee, is not a reasonable accommodation." *Ramos*, 2021 WL 5866724, at *3 (citing *Stern v. St. Anthony's Health Ctr.*, 788 F.3d 276, 289 (7th Cir. 2015) (internal citations omitted)).

CONCLUSION

For the reasons given above,

IT IS HEREBY ORDERED that Defendant's motion for summary judgment, ECF No. 26, is **GRANTED**, and the case is **DISMISSED.** The Clerk of Court is directed to enter judgment accordingly.

Dated at Milwaukee, Wisconsin on March 9, 2022.

s/ *Brett H. Ludwig*
BRETT H. LUDWIG
United States District Judge