UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALLYSE VANDER PLAATS, et al.,
Plaintiffs,

v. **Case No. 22-CV-1122**

CRISIS PREVENTION INSTITUTE, INC.,
Defendant.

DECISION AND ORDER

Plaintiffs Allyse Vander Plaats, Nathesia Browder, and Stefanie Willis filed a complaint alleging failure to accommodate, disparate treatment, and retaliation under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA"), as well as interference and retaliation under the Family Medical Leave Act, 29 U.S.C. § 2601 *et seq.* ("FMLA"), by their former employer, Crisis Prevention Institute. Defendants move for summary judgment on all claims. Plaintiffs move for partial summary judgment on the FMLA interference claims and on Stefanie Willis' ADA claims. For the reasons stated below, I will grant CPI's motion and deny plaintiffs' motion for summary judgment.

I. BACKGROUND

Crisis Prevention Institute ("CPI") provides de-escalation and crisis prevention training to service-oriented industries such as schools, healthcare facilities, and correctional institutions. CPI offers Nonviolent Crisis Intervention ("NCI") training, which teaches people how to recognize when someone is in distress and how to de-escalate the situation. Because there are times when patients, inmates, or children with special needs experience an escalation of distress, NCI training also involves learning physical intervention skills, such as safe holds and disengagement moves, that can be used

when the distress level of a patient, student, or other individual has escalated to the point that physical intervention is necessary to prevent them from harming themselves or another. NCI training spans four days, with two of those days dedicated to teaching these physical intervention skills. CPI delivers its training in person, through its network of Global Professional Instructors ("GPIs"). Vander Plaats, Browder, and Willis were previously employed by CPI as GPIs.

GPIs typically travel the country for three consecutive weeks to perform in-person NCI trainings, and then have one "recharge week" off. During a recharge week, GPIs may be required to attend scheduled meetings, respond to emails and phone calls, or be available to travel in case needed to fill in for another GPI in an emergency. Due to their unique schedule, GPIs receive six weeks of Protected Personal Time Off ("PPTO"), which allows a GPI to designate three recharge weeks in each half of the calendar year when they cannot be required to perform any work.

A. COVID-19 Pandemic

In March 2020, the onset of the COVID-19 pandemic made it impossible for GPIs to conduct in-person training. However, many of CPI's education and healthcare customers were considered "essential businesses" that never completely shut down or were among the first to reopen. In response, CPI developed programs to deliver some of its trainings virtually. CPI rolled out its virtual NCI training in January 2021, which consisted of a one-day program covering verbal de-escalation techniques only. Once it became feasible, CPI required virtual NCI participants to later attend two days of in-person training with a GPI to complete the physical skills portion of their training.

Because different states and industries emerged from the pandemic at different rates, CPI had demand for both virtual and in-person trainings. CPI initially asked for

GPIs to volunteer to train virtually as opposed to training in-person. Vander Plaats, Browder, and Willis all volunteered to train virtually. As the pandemic restrictions began to lift, CPI required its GPIs who wished to delay their return to in-person training to submit a doctor's note. As the need for more GPIs to resume in-person training grew, CPI implemented a formal accommodation process.

B. Allyse Vander Plaats

On May 19, 2020, and in July 2020, Vander Plaats provided doctor's notes indicating she could not travel due to her polycystic ovarian syndrome and a request to delay resumption of in-person training and travel because her doctor had advised her not to be in close proximity with others. CPI granted her request, and delayed Vander Plaats' resumption of in-person training. In August 2020, Vander Plaats asked to delay her return to in-person training through November 28, 2020, and CPI granted her request. On December 30, 2021, Vander Plaats made another request to further delay her return to in-person training, which CPI approved through April 20, 2021.

In spring 2021, a member of CPI human resources informed Vander Plaats that CPI could no longer delay her resumption of in-person training. Vander Plaats was told that if she could not return to in-person training, she should apply for FMLA leave.

On May 3, 2021, Vander Plaats requested FMLA leave. CPI approved Vander Plaats' FMLA leave from June 1, 2021, through August 16, 2021. On August 17, Vander Plaats requested and received an extension of her FMLA leave until August 23, 2021, the date she would exhaust the full twelve weeks of FMLA to which she was entitled. When Vander Plaats exhausted her FMLA leave on August 23, 2023, she remained unable to deliver or travel to in-person training.

C. Nathesia Browder

In August 2020, Browder requested to delay her return to in-person training due to her anxiety. CPI approved the request. In October 2020, Browder submitted another request seeking a delay in her return to in-person training, which CPI approved through March 31, 2021. In March 2021, Browder again sought delay of her return to in-person training, which CPI approved through June 28, 2021.

In spring 2021, a member of CPI human resources met with Browder virtually to discuss her ability to return to in-person training. Browder explained she was not yet ready to resume in-person training. Browder was told to apply for FMLA leave if she could not return to in-person training.

On June 21, 2021, Browder requested FMLA leave. CPI approved Browder's FMLA leave from June 28, 2021, through September 1, 2021. At Browder's request, CPI extended her FMLA leave through September 17, 2021, the date she would exhaust the full twelve weeks of FMLA to which she was entitled. Browder subsequently asked for a further delay of her resumption of in-person training and travel at least until November 1, 2021. Vice-President of Human Resources Esther Lumague emailed Browder on September 17, 2021, explaining that CPI could not continue with such an accommodation. Lumague offered to place Browder on an unpaid leave of absence, which Browder declined.

D. Stefanie Willis

On March 13, 2020, Willis, who had previously been diagnosed with type 2 diabetes, expressed concern about traveling and exposure to COVID-19. She later provided a doctor's note and a request to train virtually. CPI granted this request and allowed Willis to delay her return to in-person training.

On December 14, 2020, Willis applied for FMLA leave for a hysterectomy. CPI approved the request, and Willis took FMLA leave from December 21, 2020, to February 1, 2021. When she returned, her fitness-for-duty certification contained restrictions prohibiting travel or in-person training. Willis subsequently submitted a new doctor's note with 10-pound lifting, carrying, and pushing/pulling restriction and a no travel restriction through August 1, 2021.

In April or May 2021, Willis requested to delay her return to in-person training. Willis met with a member of CPI human resources virtually on May 12, 2021, who informed Willis that she should request FMLA leave if she remained unable to resume in-person training. On May 19, 2021, Willis requested FMLA leave. CPI approved Willis' request, granting her FMLA leave from June 7, 2021, through July 18, 2021, the date she would exhaust the full twelve weeks of FMLA to which she was entitled.

On July 7, 2021, prior to the expiration of her FMLA leave, Willis had a check-in meeting with Lumague, Senior Human Resources Generalist Jenay Chalkley, and Vice-President of Training Jeff Schill, to discuss her return. During this meeting, Willis stated that she had open diabetic wounds on her feet that prevented her from traveling at least until August 1, 2021, the date on which the previous restrictions from her doctors expired. Willis testified that during the meeting, she unequivocally stated that she would be able to resume travel and in-person training on August 1, like it said in her medical documentation. CPI does not contest that the medical documentation stated that Willis could return on August 1, but contends that Willis told human resources during the July 7, 2021, meeting that she did not know when her diabetic wounds would heal. On Friday, July 16, 2021, Lumague emailed Willis stating that CPI would administratively end her employment effective August 1, 2021.

E. Training and Development Consultant Position

Seeking to enhance its virtual options, CPI developed the new role of Training and Development Consultant ("TDC"). CPI sought to select three of its GPIs to serve as TDCs, who were to take over all of CPI's virtual training beginning in January 2022. Vice President of Customer Care Michael Mevis and Schill were the final decisionmakers on which candidates were selected for the three vacant TDC positions. All three plaintiffs applied for the open TDC positions, but none of them were selected.

II. DISCUSSION

Summary judgment is required where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When considering a motion for summary judgment, I view the evidence in the light most favorable to the non-moving party and must grant the motion if no reasonable juror could find for that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 255 (1986).

A. ADA Discrimination Claims

The ADA prohibits covered employers from "discriminat[ing] against a qualified individual on the basis of disability." 42 U.S.C. § 12112(a). A "qualified individual" is one "who, with or without reasonable accommodation, can perform the essential functions of the employment position." 42 U.S.C. § 12111(8). There are two types of discrimination claims under the ADA. "First is a disparate treatment claim, where the plaintiff alleges the employer treated him or her differently because of the plaintiff's disability." *Curtis v. Costco Wholesale Corp.*, 807 F.3d 215, 224 (7th Cir. 2015) (citing *Sieberns v. Wal-Mart Stores, Inc.*, 125 F.3d 1019, 1021–22 (7th Cir. 1997)). "The second is the employer's failure to provide a reasonable accommodation." *Id.*

1. Vander Plaats and Browder

CPI moves for summary judgment on the ADA discrimination claims alleged by Vander Plaats and Browder. CPI argues that these claims fail as a matter of law because Vander Plaats and Browder are not "qualified individuals" under the ADA. CPI asserts that regardless of accommodation, Vander Plaats and Browder could not travel or deliver in-person training, both of which are essential functions of the GPI role. The ADA's implementing regulations define "essential functions" as the "fundamental job duties of the employment position," excluding "marginal functions of the position." 29 C.F.R. § 1630.2(n)(1). Whether a function is "essential" is a question of fact. *Brown v. Smith*, 827 F.3d 609, 613 (7th Cir. 2016). In determining whether a job function is essential, I must consider the employer's judgment, written job descriptions, the amount of time spent on the function, and the experience of those who previously or currently hold the position. *Rooney v. Koch Air, LLC*, 410 F.3d 376, 382 (7th Cir. 2005) (citing 29 C.F.R. § 1630.2(n)(3)). I presume that the employer's understanding of the essential functions of a job is correct unless the plaintiffs can offer sufficient evidence to the contrary. *Conners v. Wilkie*, 984 F.3d 1255, 1261 (7th Cir. 2021) (citing *Gratzl v. Off. of Chief JJ. of 12th, 18th, 19th, and 22nd Jud. Circuits*, 601 F.3d 674, 679 (7th Cir. 2010)).

The GPI job description states that "[f]requent travel is required," and that GPIs must spend three weeks each month, for a total of approximately 34 weeks per year, travelling to deliver in-person training to CPI's customers. ECF No. 53, ¶¶ 9–10. CPI asserts that the temporary suspension of in-person training during the height of the COVID-19 pandemic does not change the fact that travel and in-person training were, and remain, essential functions of the GPI role. Considering the written job description, the significant amount of time that GPIs spend on the road, my deference to CPI's

understanding of the role, and that plaintiffs present no significant evidence to the contrary, I find that a reasonable jury would be required to conclude that travel and in-person training are essential functions of the GPI position.

It is undisputed that at the time Vander Plaats exhausted her FMLA leave on August 23, 2021, she was unable to resume travel or deliver in-person training. ECF No. 45, ¶¶ 109–110. CPI understood that Vander Plaats would not be able to resume these essential functions any time soon, as her fitness-for-duty certification stated that she was permanently restricted from work-related travel. *Id.*, ¶ 111. It is also undisputed that when Browder exhausted her FMLA leave on September 17, 2021, she was unable to resume travel or deliver in-person training. *Id.*, ¶ 113. Browder's fitness-for-duty certification indicated that she would not be able to resume these functions until November 1, 2021. *Id.*

Plaintiffs argue that CPI could have accommodated Vander Plaats and Browder by allowing them to continue working virtually, as CPI still had demand for virtual training at the time. But this would have required CPI to allocate all virtual trainings to the plaintiffs, and to allocate in-person trainings to other GPIs. An employer is not obligated to change the essential functions of a job to accommodate an employee. *Emerson v. N. States Power Co.*, 256 F.3d 506, 514 (7th Cir. 2001); *see also Gratzl*, 601 F.3d at 680 ("An employer need not create a new job or strip a current job of its principal duties to accommodate a disabled employee."); *Stern v. St. Anthony's Health Ctr.*, 788 F.3d 276, 290–91 (7th Cir. 2015) (explaining that reallocating marginal functions can be a reasonable accommodation but reallocating essential functions is not). That CPI had previously allowed Vander Plaats and Browder to be fully virtual does not mean that travel and in-person training are not essential functions of the GPI

role. *See Conners*, 984 F.3d at 1262. Because Vander Plaats and Browder could not perform the essential functions of the role at the time of termination, they cannot be considered "qualified individuals" for ADA discrimination claims related to their employment as GPIs.

Plaintiffs instead argue that CPI could have reasonably accommodated Vander Plaats and Browder by reassigning them to the open TDC positions. Reassignment to a vacant position may be a reasonable accommodation under the ADA. *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476, 482 (7th Cir. 2017); *see* 42 U.S.C. § 12111(9)(B). It is plaintiffs' burden to show that there was a vacant position that Vander Plaats and Browder were qualified for at the time of their termination. *Severson*, 872 F.3d at 482 (citing *Kotwica v. Rose Packing Co., Inc.*, 637 F.3d 744, 750 (7th Cir. 2011)); *see also Conners*, 984 F.3d at 1262.

CPI contends that Vander Plaats and Browder were not qualified for these vacant positions because travel and in-person training are also essential functions of the TDC role. CPI notes that TDCs are required to deliver in-person trainings quarterly to maintain competency, attend GPI development events, and be available to deliver in-person training when a GPI becomes unavailable, all of which require the ability to travel. Plaintiffs argue that travel is not an essential function of the TDC role. Plaintiffs note that after the TDC openings were posted, CPI changed the job description to include a travel requirement that was not originally included. Plaintiffs also point to the testimony of former CPI employee Cassandra Stramowski, who helped create the TDC position, stating her belief that travel was not an essential function of the role. Even assuming that this evidence could create a genuine issue of material fact as to whether

travel is an essential function of the TDC role, plaintiffs fail to persuasively argue that *delivery of in-person training* is not an essential function of the TDC role.

CPI notes that the purpose of the quarterly in-person training requirement is to ensure that TDCs remain experienced with in-person training so that they can provide expert advice and consultation to CPI's customers. This requirement was listed in both the effective and the original TDC job description. *Compare* ECF No. 26-22 (Original TDC Job Description), *with* ECF No. 26-56 (TDC Job Description, revised 8/3/21). Plaintiffs do not argue that delivery of quarterly in-person training is not an essential function. Indeed, plaintiffs clearly recognize the importance of the requirement, as they argued that CPI could have accommodated Vander Plaats and Browder by assigning them to in-person trainings within driving distance of their homes in order for them to meet the requirement quarterly. *See* Pls.' Br. in Opp. to Mot. for Summ. J. at 14–15, ECF No. 47. Because I presume that CPI's understanding of the essential functions of the TDC role are correct unless plaintiffs offer sufficient evidence to the contrary, *Conners*, 984 F.3d at 1261–62, and because plaintiffs have failed to meet this burden, I find that a reasonable jury would be required to conclude that in-person training is an essential function of the TDC role.

It is undisputed that Vander Plaats and Browder were unable to deliver in-person training at the time they applied for the TDC positions. *See* Dep. of Allyse Vander Plaats at 115:12–115:23, ECF No. 26-1;[1] Dep. of Nathesia Browder at 127:18–127:24, ECF

[1] Vander Plaats confirmed in her October 11, 2023, deposition:

> Q: All right. And then my understanding from your earlier testimony is that you were not able to return to in-person training on August 23rd, 2021; correct?
>
> A: Correct.

No. 26-2.[2] Thus, Vander Plaats and Browder cannot be considered "qualified individuals" for ADA discrimination claims related to CPI's failure to select them for the TDC position. To the extent plaintiffs argue that Vander Plaats and Browder should have been permitted to perform only the virtual responsibilities of the TDC position as an accommodation, as previously noted, it is not reasonable to require an employer to eliminate or reallocate essential functions of a job. *Emerson*, 256 F.3d at 514; *Gratzl*, 601 F.3d at 680.

Even assuming that in-person training is not an essential function of the TDC role, CPI was under no obligation to reassign Vander Plaats and Browder to the vacant TDC positions. Though reassignment to a vacant position may be considered a reasonable accommodation, an employer is not required to accommodate a disabled employee by promoting her to a higher-level position. *Malabarba v. Chicago Trib. Co.*, 149 F.3d 690, 699 (7th Cir. 1998). CPI argues that the TDC position would have been a promotion for a GPI. The job description noted that the TDC role required previous experience with CPI's various training programs. The role also involved increased

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Q: And that's because you were still unable to travel to in-person training; right?

A: Correct.

Q: And you were still unable to actually deliver the in-person training in a group setting; correct?

A: Correct.

[2] Browder confirmed in her October 23, 2023, deposition:

Q: So as of September 17th, 2021, you were still unable to travel to in-person NCI training or other CPI programs; correct?

A: Yes.

Q: And as of September 17th, 2021, you were still unable to deliver in-person training; correct?

A: Yes.

responsibilities, such as advising customers on and delivering specialty topics training, facilitating virtual workshops, and managing community-specific online forums. ECF No. 45, ¶ 134. The three GPIs selected to become TDCs each received a notable salary increase, and their offer letters stated "Congratulations! You are being promoted to a Training and Development Consultant." ECF No. 44-29. The record clearly demonstrates that the TDC position would have been a promotion for Vander Plaats and Browder. *See Brown v. Milwaukee Bd. of Sch. Dirs.*, 855 F. 3d 818, 827–28 (7th Cir. 2017) (concluding that a vacant position with substantially increased responsibilities and a salary increase was a promotion). Thus, CPI did not fail to accommodate them in failing to promote them to the TDC role.

Accordingly, CPI is entitled to summary judgment on the ADA discrimination claims alleged by Vander Plaats and Browder.

2. Willis

Both plaintiffs and CPI move for summary judgment on Willis' ADA discrimination claims. Plaintiffs allege that CPI failed to reasonably accommodate Willis and discriminated against her on the basis of her disability by terminating her. CPI argues that Willis was not a qualified individual under the ADA because she could not travel or deliver in-person training, essential functions of the GPI role, at the time she exhausted her FMLA leave on July 18, 2021. Plaintiffs allege that the medical documentation provided to CPI indicated that Willis would have been able to return to work on August 1, 2021, approximately two weeks after her FMLA leave was exhausted, and that CPI failed to accommodate her by not granting a short extension of her leave or allowing her to work remotely for those two weeks until she could resume travel and in-person training.

It is undisputed that Willis could not perform the essential functions of travel and in-person training the day she exhausted her FMLA leave. Plaintiffs argue that CPI could have provided the reasonable accommodation of allowing Willis to work remotely for two weeks until she could resume travel and in-person training on August 1. As previously stated, CPI was under no obligation to create a virtual-only GPI role or to reallocate all the virtual trainings to Willis as a reasonable accommodation. *Emerson*, 256 F.3d at 514; *Gratzl*, 601 F.3d at 680. That CPI previously allowed Willis to conduct only virtual trainings does not require it to continue with such an accommodation. *See Vande Zande v. State of Wis. Dept. of Admin.*, 44 F.3d 538, 545 (7th Cir. 1995) (concluding that an employer who "bends over backwards to accommodate a disabled worker—goes further than the law requires . . . must not be punished for its generosity by being deemed to have conceded the reasonableness" of an accommodation).

Plaintiffs also argue that CPI could have accommodated Willis by allowing her to take two weeks of unpaid leave.[3] Plaintiffs are correct that the case law recognizes that for a disability involving an "intermittent condition" that requires occasional time off for "brief periods," such as a few days or a couple of weeks, brief periods of leave may be considered a reasonable accommodation. *See Severson*, 872 F.3d at 480; *see also Haschmann v. Time Warner Entm't Co.*, 151 F.3d 591, 599–601 (7th Cir.1998); *Byrne v. Avon Products, Inc.*, 328 F.3d 379, 381 (7th Cir. 2003). However, such an accommodation cannot be considered reasonable in Willis' case.

[3] CPI asserts that it *did* permit Willis to take an extra two weeks of unpaid leave, and that she was not terminated until August 1, 2021. But plaintiffs dispute this, asserting that Willis' leave was not extended and that she was terminated on July 19, 2021. The dispute is inconsequential, however, because the requested accommodation cannot be considered reasonable, even assuming plaintiffs' version of the facts is true.

In *Severson*, a disabled employee took the full allotted twelve weeks of medical leave under the FMLA to deal with his back pain. 872 F.3d at 479. On the last day of his leave, he underwent back surgery and sought from his employer a two- to three-month leave of absence as an accommodation for his medical condition. *Id.* at 479–80. In affirming summary judgment for the defendant, the Seventh Circuit acknowledged that "[i]ntermittent time off or a short leave of absence—say, a couple of days or even a couple of weeks" could, under some circumstances, constitute a reasonable accommodation. *Id.* at 481. But based on prior precedent, the court concluded that "medical leave spanning multiple months does not permit the employee to perform the essential functions of his job," and thus, "the inability to work for a multi-month period removes a person from the class protected by the ADA." *Id.* (citing *Byrne v. Avon Products, Inc.*, 328 F.3d 379, 381 (7th Cir. 2003)).

Willis' requested accommodation cannot be considered "intermittent time off." Intermittent implies that the leave of absence is not continuous. Willis' request was, in essence, for a two-week extension of the FMLA leave that she had already exhausted. The court in *Severson* rejected the notion that an employee could request a leave of absence under such circumstances:

> If . . . employees are entitled to extended time off as a reasonable accommodation, the ADA is transformed into a medical-leave statute—***in effect, an open-ended extension of the FMLA. That's an untenable interpretation of the term "reasonable accommodation."***

Id. at 482 (emphasis added). Though the plaintiff in *Severson* sought a much longer period of leave—two months as opposed to two weeks—the principle is the same. Allowing employees to tack on a "short leave of absence" of two weeks after already

exhausting their allotted leave would render the twelve weeks prescribed by the FMLA a nullity. Such an accommodation cannot be considered reasonable.

Because Willis could not, with or without reasonable accommodation, perform the essential functions of her role at the time of their termination, she cannot be considered a qualified individual under the ADA. Accordingly, I will grant CPI's motion for summary judgment and deny plaintiffs' motion for summary judgment on Willis' ADA discrimination claims.

B. ADA Retaliation Claims

Unlike discrimination claims, the ADA's retaliation provision is not limited to "qualified individuals." *See* 42 U.S.C. § 122203(a); *Morgan v. Joint Admin. Bd.*, 268 F.3d 456, 458–59 (7th Cir. 2001) (noting that ADA protections against discrimination are protections of "qualified individuals" with a disability, "but the retaliation provision protects individuals, period."). The complaint alleges that CPI terminated plaintiffs' employment in retaliation for seeking accommodations. CPI asserts that plaintiffs are merely attempting to reframe their failure to accommodate claims as claims of retaliation in order to avoid the qualified individual requirement.

The Seventh Circuit has held that a plaintiff "may not make an end-run around the 'qualified individual' requirement by simply reframing a discrimination or accommodation claim as one for retaliation." *Rodrigo v. Carle Found. Hosp.*, 879 F.3d 236, 243 (7th Cir. 2018). In *Rodrigo*, the defendant-hospital required its medical residents to pass a certain test before advancing to their third year of residency. The court affirmed summary judgment for the defendant on the plaintiff's failure to accommodate claim based on the finding that passing the test was an "essential function" of the job. *Id.* at 242–243. The court further concluded that the plaintiff could

not claim retaliation based on his termination after the hospital refused to waive the test requirement due to his disability. *Id.* at 243 ("[Defendant's] alleged 'retaliation' was simply an enforcement of its [test] policy, and the retaliation claim is thus a collateral attack on the legitimacy of that requirement."). Accordingly, if a plaintiff "is not a qualified individual for the purposes of [her] discrimination and accommodation claims," it follows that she is also "not a qualified individual for [her] mislabeled retaliation claim." *Id.*

Here, it is undisputed that plaintiffs were unable to perform the essential functions of their jobs at the time their employment ended. Plaintiffs cannot reframe their failure to accommodate claims as retaliation claims. Moreover, plaintiffs fail to address their ADA retaliation claims in their summary judgment briefing and have thus waived the argument. *Nichols v. Mich. City Plant Planning 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."). CPI is therefore entitled to summary judgment on plaintiffs' ADA retaliation claims.

C. FMLA Claims

The FMLA entitles employees to "take reasonable leave for medical reasons," in a manner that "accommodates the legitimate interests of employers." 29 U.S.C. § 2601(b)(2)−(3). To accomplish this goal, the FMLA provides that an eligible employee may take up to twelve (unpaid) weeks of leave during a twelve-month period if she is unable to perform the functions of her position because of a serious health condition. 29 U.S.C. § 2612(a)(1).

1. FMLA Interference Claims

Both plaintiffs and CPI move for summary judgment on plaintiffs' FMLA interference claims. It is unlawful for an employer "to interfere with, restrain, or deny the

exercise of or the attempt to exercise" any right provided under the FMLA. 29 U.S.C. § 2615(a)(1). Plaintiffs allege interference with their FMLA rights when CPI denied their requests to use PPTO during their leave. The FMLA provides that "[a]n eligible employee may elect . . . to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee" for any part of the 12-week period. 29 U.S.C. § 2612(d)(2)(B). Plaintiffs argue that PPTO is "accrued paid leave" under the statute. CPI denies that PPTO meets the definition of accrued paid leave under the FMLA, arguing that it is merely a scheduling mechanism that allows GPIs to select which of their recharge weeks they would like to use for vacations or personal appointments.

As noted above, PPTO stands for "Protected Personal Time Off" and is unique to GPIs due to their unorthodox work schedule. Before the pandemic disrupted the delivery of in-person training, GPIs traveled the country for three consecutive weeks to deliver in-person trainings, and then received one "recharge week" off. Though GPIs are not scheduled to deliver in-person trainings, recharge weeks are not considered time-off because a GPI is still expected to attend scheduled meetings, conduct one-on-ones with their manager, and reply to emails and phone calls in a timely manner. The GPI Training Manual[4] explains CPI's PPTO policy as follows:

> A GPI can protect up to six of their Recharge weeks per year as follows: a GPI may protect up to three weeks between January 1 and June 30 and up to three additional weeks between July 1 and December 31. This is called Protected Personal Time Off (PPTO). PPTO is unique to GPIs.

[4] The parties dispute exactly what language appeared in the manual during the plaintiffs' employment with CPI. *See* ECF No. 15, ¶¶ 11, 14. The dispute is irrelevant because, even assuming the language put forward by plaintiffs is the applicable version, CPI is still entitled to summary judgment on plaintiffs' FMLA interference claims.

> If a GPI does not use PPTO over any six-month period, the GPI's annual Recharge Weeks will not be impacted—the GPI will still receive their 18-20 Recharge weeks every year. PPTO merely locks in a certain week that a GPI may need for a personal appointment or vacation. However, PPTO does not carry over from one six-month period to the next. For example, if a GPI uses two weeks of PPTO between January 1 and June 30, the GPI may only take three weeks of PPTO between July 1 and December 31, not four weeks.

ECF No. 22-10 at 2.

Vander Plaats' FMLA leave began on June 1, 2021, Browder's FMLA leave began on June 29, 2021, and Willis' FMLA leave began on June 7, 2021. The undisputed evidence shows that CPI allowed Browder to substitute two PPTO days on June 29 and 30, ECF No. 22-18, and allowed Willis to substitute four PPTO days on June 11, 12, 14, and 15, ECF No. 37, ¶ 90. Subsequently, all three plaintiffs requested to substitute the three weeks of PPTO for the second half of the year for their unpaid FMLA leave. CPI declined, stating that they were not eligible to use the PPTO for the second half of the year because they were not on active status on July 1. Plaintiffs assert that this refusal constitutes FMLA interference, because plaintiffs "accrued" their three weeks of PPTO for the second half of the year on July 1, 2021, whether they were on FMLA leave or not.

The burden of proving an FMLA interference claim is on the plaintiff-employee. *Goelzer v. Sheboygan Cty., Wis.*, 604 F.3d 987, 993 (7th Cir. 2010). To prevail on such a claim, a plaintiff must show that (1) she was eligible for FMLA protections; (2) her employer was covered by the FMLA; (3) she was entitled to take leave under the FMLA; (4) she provided sufficient notice of her intent to take leave; and (5) her employer interfered with, restrained, or denied FMLA benefits to which she was entitled. *Juday v. FCA US LLC*, 57 F.4th 591, 595 (7th Cir. 2023) (citing *Ziccarelli v. Dart*, 35 F.4th 1079,

1089 (7th Cir. 2022)). It is undisputed that the plaintiffs satisfy the first four elements. The parties dispute whether CPI's actions interfered with, restrained, or denied plaintiffs of a benefit to which they were entitled under the FMLA.

Assuming without deciding that PPTO would be considered accrued paid leave under the statute, I find that plaintiffs fail to demonstrate that CPI interfered with an FMLA right. The FMLA unequivocally states that taking of leave "shall not result in the loss of any employment benefit ***accrued prior to the date on which the leave commenced***." 29 U.S.C. § 2614(b) (emphasis added). The regulations require that "[a]t the end of an employee's FMLA leave, benefits ***must be resumed*** in the same manner and at the same levels as provided when the leave began." 29 C.F.R. § 825.215(d)(1). It is thus clear that benefits accrued prior to leave must be maintained and must be resumed upon the end of leave. However, during FMLA leave:

> An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave. Benefits accrued at the time leave began, however, (e.g., paid vacation, sick or personal leave to the extent not substituted for FMLA leave) must be available to an employee upon return from leave.

29 C.F.R. § 825.215(d)(2). It would thus not be unlawful for CPI to enforce a policy that GPIs do not accrue PPTO while on FMLA leave.

Plaintiffs argue that CPI had no express policy that GPIs did not accrue PPTO while on FMLA leave, and that without such a policy, they automatically "accrued" the three weeks of PPTO for the second half of the year on July 1, despite being out on FMLA leave. "An employee's ability to substitute accrued paid leave [for unpaid FMLA leave] is determined by the terms and conditions of the employer's normal leave policy." 29 C.F.R. § 825.207(a). CPI's normal PPTO policy permits a GPI to "protect" three of their recharge weeks between July 1 and December 31. But during their FMLA leave,

plaintiffs had no recharge weeks to protect because they were not training or traveling at the time. Considering this, I cannot see how CPI's refusal to provide plaintiffs with PPTO for the second half of the year is contrary to the normal policy. Plaintiffs do not present any evidence that CPI had deviated from this policy in the past. Nor have they shown that CPI allowed other employees on leave to accrue and/or use PPTO during such leave. It was CPI's position from the start that plaintiffs would not be able to utilize their PPTO while out on leave. As required, CPI allowed plaintiffs to substitute any remaining PPTO from the first half of the year during their FMLA leave. And CPI reassured plaintiffs that if they returned to the GPI position after their leave was exhausted, they would be able to use the PPTO for the second half of the year. Because plaintiffs bear the burden of proving an FMLA interference claim, *Goelzer*, 604 F.3d at 993, and because they have failed to show that CPI acted contrary to its normal leave policy, CPI is entitled to summary judgment on these claims.

Second, Plaintiffs argue that CPI interfered with the exercise of an FMLA right when it did not allow Willis and Browder to use PPTO to extend the duration of their FMLA leave. Plaintiffs first contend that because Browder used her PPTO for June 29 and 30, the start date for her FMLA leave should have been July 1, 2021, as opposed to June 29, allowing her two additional days of FMLA leave. Additionally, plaintiffs assert that Willis should have been allowed to use the three weeks of PPTO from the second half of the year to extend her FMLA leave until August 1, 2021, the date her work-restrictions were set to expire. This argument fails because the FMLA's implementing regulations expressly allow an employer to run accrued paid leave concurrent with FMLA leave. *See* 29 C.F.R. § 825.207(a) (explaining that "substitute" as used in 29 U.S.C. § 2612(d)(2)(B) means that "the paid leave provided by the employer, and

accrued pursuant to established policies of the employer, ***will run concurrently with the unpaid FMLA leave***") (emphasis added).

Finally, plaintiffs argue that CPI failed to reinstate them upon the expiration of their FMLA. On return from FMLA leave, "an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment." 29 C.F.R. § 825.214. "Firing an employee to prevent her from exercising her right to return to her prior position can certainly interfere with that employee's FMLA rights." *Simpson v. Office of the Chief Judge of the Circuit Court of Will County*, 559 F.3d 706, 712 (7th Cir. 2009); *Goelzer*, 604 F.3d at 993. However, an employee's right to return to work after taking FMLA leave is not absolute. "If the employee is unable to perform an essential function of the position . . . the employee has no right to restoration to another position under the FMLA." 29 C.F.R. § 825.216(c). As discussed above, it is undisputed plaintiffs were unable to perform the essential functions of the travel and delivery of in-person training at the time they each exhausted their FMLA leave. Because plaintiffs did not have the right to reinstatement, CPI did not interfere with an FMLA right in failing to reinstate them.

In sum, plaintiffs fail to meet their burden of demonstrating that CPI's actions interfered with, restrained, or denied plaintiffs of an FMLA benefit to which they were entitled. I will grant CPI's motion for summary judgment and deny plaintiffs' motion for summary judgment on the FMLA interference claims.

2. FMLA Retaliation Claims

Plaintiffs argue that CPI did not select Vander Plaats and Browder for the TDC position in retaliation for taking FMLA leave. An employer may not retaliate against an

employee for exercising her FMLA rights. 29 U.S.C. § 2615(a)(2). An employee claiming retaliation in violation of the FMLA must show that (1) she engaged in FMLA-protected activity; (2) her employer took a materially adverse employment action against her; and (3) there is a causal connection between the two. *Juday*, 57 F.4th at 596 (citing *Curtis v. Costco Wholesale Corp.*, 807 F.3d 215, 220 (7th Cir. 2015)). A retaliation claim requires proof of discriminatory or retaliatory intent, meaning evidence that the employer "was acting under a prohibited animus." *Id.* (citing *Cracco v. Vitran Express, Inc.*, 559 F.3d 625, 634 (7th Cir. 2009)). Under the direct method, a plaintiff must present evidence that her employer took materially adverse action against her on account of the protected activity. *Burnett v. LFW Inc.*, 472 F.3d 471, 481 (7th Cir. 2006). Inferences may be drawn from circumstantial evidence, meaning a plaintiff can rely on "a convincing mosaic of circumstantial evidence that allows a jury to infer intentional discrimination by the decisionmaker." *Juday*, 57 F.4th at 596 (citing *Scruggs v. Carrier Corp.*, 688 F.3d 821, 827 (7th Cir. 2012)). A plaintiff survives summary judgment by creating a genuine issue of material fact as to whether the adverse employment action had a discriminatory motivation, "unless the employer presents unrebutted evidence that it would have taken the adverse action against the plaintiff even if it did not have a retaliatory motive." *Goelzer*, 604 F.3d at 996 (citing *Burnett*, 472 F.3d at 481).

The first element, that Vander Plaats and Browder engaged in an FMLA-protected activity, is undisputed. Failing to promote an employee is a materially adverse employment action for purposes of the FMLA, satisfying the second element. *Malin v. Hospira, Inc.*, 762 F.3d 552, 562 (7th Cir. 2014) (citing *Breneisen v. Motorola, Inc.*, 512 F.3d 972, 978–79 (7th Cir. 2008)). I therefore consider whether a reasonable jury could

find that CPI's failure to promote Vander Plaats and Browder had a discriminatory motivation.

Plaintiffs first point to the late change in the TDC job description adding travel as a requirement as evidence of intent to keep Vander Plaats and Browder out of contention. Second, plaintiffs assert that asking the candidates if they would be able to "travel at a moment's notice" bolsters this assertion. Third, plaintiffs contend that after the first round of interviews, "the consensus number-one pick for the TDC position was Vander Plaats followed by Browder," but after Mevis' second-round interviews with the candidates, "Schill inexplicably changed his rankings and removed Vander Plaats as his top pick." Pls.' Br. in Opp. to Mot. for Summ. J. at 24, ECF No. 47. I cannot see how any of the evidence presented by plaintiffs constitutes proof, even circumstantial proof, that CPI refused to promote them in retaliation for taking FMLA leave. Moreover, it is undisputed that Vander Plaats and Browder were unable to deliver in-person training in August 2021, when the interviews were taking place. To survive summary judgment, plaintiffs must produce evidence from which a reasonable jury could infer that this lack of qualification was not the real reason for the failure to promote Vander Plaats and Browder and that CPI was instead retaliating against them for exercising their statutory leave rights. Plaintiffs have not done so. I will therefore grant CPI's motion for summary judgment as to plaintiffs' FMLA retaliation claims.

D. Plaintiffs' Motion to Strike CPI's Reply

Plaintiffs move to strike CPI's reply to plaintiffs' response to CPI's proposed finding of fact (ECF No. 60), arguing that the Local Rules of this court do not permit a reply to a party's opposition to proposed findings of fact. In response, CPI notes that the Local Rules do not expressly permit or prohibit replies. In any event, I did not consider

CPI's reply in ruling on the parties' motions for summary judgment and will therefore deny plaintiffs' motion as moot.

III. CONCLUSION

THEREFORE, IT IS ORDERED that plaintiffs' motion for summary judgment (ECF No. 21) is **DENIED**.

IT IS FURTHER ORDERED that CPI's motion for summary judgment (ECF No. 25) is **GRANTED**. The Clerk shall enter final judgment accordingly.

IT IS FURTHER ORDERED that plaintiffs' motion to strike defendant's reply to plaintiffs' response to defendant's proposed finding of fact (ECF No. 62) is **DENIED AS MOOT**.

Dated at Milwaukee, Wisconsin, this 21st day of August, 2024.

/s/ Lynn Adelman
LYNN ADELMAN
United States District Judge