



and defers to the United States Attorney General's position regarding the constitutionality of the federal statute.

**B. If the Court Upholds the Constitutionality of the ADA, Plaintiff's Claims Under the ADA Should Be Dismissed.**

Although Cabela's takes no position regarding the constitutional question raised by Plaintiff, Cabela's respectfully submits that, if the Court upholds the constitutionality of the statutory exclusion contained in the ADA, Plaintiff's claims under the ADA should be dismissed.

1. **If the Court Upholds the Constitutionality of the ADA, Plaintiff Fails to State a Claim for Disability Discrimination.**

If the Court upholds the constitutionality of the statutory exclusion contained in the ADA, Plaintiff cannot state a claim for disability discrimination because gender identity disorders would, by the plain language of the statute, be excluded from the purview of the ADA.

Likewise, Plaintiff's "regarded as" argument would fail. With respect to Plaintiff's argument that "Defendant mistakenly perceived her to suffer from a mental infirmity," Opposition at p. 40, the Complaint is devoid of any allegation that Cabela's perceived Plaintiff "to be suffering from an impairment within the meaning of the statutes, not just that the employer believed the employee to be somehow disabled." Rinehimer v. Cemcolift, Inc., 292 F.3d 375, 381 (3d Cir. 2002) (quotations omitted). Plaintiff's argument that Defendant required her to work "in one area of the store, forcing her to only stock items in its 'Gifts Department,'" does not support the conclusion that Cabela's perceived Plaintiff as being disabled, impaired, substantially limited in any major life activity, or unable to perform a wide range or class of jobs. See Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997) (explaining that a court does not have to accept unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations contained in the complaint); Baraka v. McGreevy, 481 F.3d 187, 195 (3d Cir.

2007), cert. denied, 128 S. Ct. 612 (2007) (explaining that the court need not accept as true “unsupported conclusions and unwarranted inferences”). Likewise, Plaintiff’s allegation that she was denied promotions for which she applied does not support the conclusion that Cabela’s perceived her to be disabled or impaired in any way. Similarly, Plaintiff’s allegation regarding the Maintenance Manager’s alleged comment to Mr. Bowers, Opposition at p. 40, does not evidence the expression of any perception that her ability to think was impaired. Finally, Plaintiff’s allegation that Ms. Gates purportedly expressed that Plaintiff “could potentially rape or sexually assault a person in the female restroom,” does not support the conclusion that Cabela’s perceived Plaintiff as being disabled, impaired, substantially limited in any major life activity, or unable to perform a wide range or class of jobs. Plaintiff has failed to identify any facts showing that Cabela’s believed that she was disabled, impaired, or substantially limited in any major life activity.

Finally, Plaintiff has failed to state a claim for disability discrimination under the ADA based upon having a record of impairment. Although Plaintiff states in a footnote that she has adequately pleaded that her “[g]ender dysphoria ‘substantially impairs one or more of her major life activities, including, but not limited to, interacting with others, reproducing, and social and occupational functioning,’” Opposition at p. 40 n. 18, Plaintiff has failed to set forth any allegations that a record of her impairment exists. Moreover, Plaintiff has failed to allege that Cabela’s relied on any record of impairment in making its employment decisions. See Eshelman v. Agere Sys., 554 F.3d 426, 437 (3d Cir. 2009) (explaining that plaintiff had to prove that she had a record of impairment and, further, that the employer relied upon her record of impairment in making its employment decision). Moreover, “if the record at issue does not reference a disability or condition covered by the ADA, [the employer] is not liable even if it did rely on that

record in making the adverse employment decision.” Id. (citing Sinkler v. Midwest Prop. Mgmt. Ltd. P’ship, 209 F.3d 678, 683 (7<sup>th</sup> Cir. 2000)).

As a result of the foregoing, if the Court upholds the constitutionality of the statutory exclusion contained in the ADA, Plaintiff has failed to state a claim for disability discrimination.

2. If the Court Upholds the Constitutionality of the ADA, Plaintiff Fails to State a Claim for Failure to Accommodate.

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If the Court upholds the constitutionality of the statutory exclusion contained in the ADA, Plaintiff has failed to state a claim for failure to accommodate under the ADA. As Plaintiff acknowledges, the resolution of this claim depends upon the Court’s determination regarding the constitutional question.

Notwithstanding Plaintiff’s argument that “regarded as” plaintiffs may be entitled to reasonable accommodations, Cabela’s respectfully submits that Plaintiff has failed to plead facts adequate to support a “regarded as” claim. As addressed above, Plaintiff’s allegations, even if taken to be true (which Cabela’s does not concede), that she was required to work in one area of the store, was allegedly denied promotions for which she was applied, and was allegedly the subject of comments made by the Maintenance Manager or Ms. Gates, do not support the inference that Cabela’s believed Plaintiff to be disabled, impaired, or substantially limited in any major life activity. As a result, if the Court upholds the constitutionality of the statutory exclusion contained in the ADA, Plaintiff cannot state a failure to accommodate claim.

3. If the Court Upholds the Constitutionality of the ADA, Plaintiff Fails to State a Claim for Retaliation Under the ADA.

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Finally, Plaintiff has failed to state a claim for retaliation under the ADA. Although the resolution of this claim depends, in part, upon the Court's determination of the pending constitutional question, Cabela's respectfully submits that Plaintiff has failed to plead facts showing that she engaged in protected activity by opposing discrimination on the basis of disability.

A plain reading of the Amended Complaint reveals that Plaintiff's allegations relate to her purported reports of conduct that she alleges to be discriminatory "on the basis of her sex," not any disability. Amended Complaint at ¶ 21 (alleging, "numerous employees began subjecting Plaintiff Blatt to constant degrading and discriminatory comments on the basis of her sex"); Amended Complaint at ¶ 22 (alleging, "In response, Plaintiff Blatt continually reported the discriminatory conduct . . ."); Amended Complaint at ¶ 26 (alleging, "Plaintiff Baltt overheard the current Maintenance Manager state to Bowers, 'Can you believe this cross-dressing gay fruit wants a job in my department? The confused sicko can't figure out that he is gay and admit it'"); Amended Complaint at ¶ 40 (alleging, under Count I (Title VII), that "Plaintiff considered the aforementioned conduct to be discriminatory and reported said discriminatory conduct . . .").

Similarly, Cabela's respectfully submits that the Amended Complaint does not contain allegations showing that Plaintiff engaged in protected activity by requesting an accommodation for a disability. Rather, the facts, as alleged, make it clear that Plaintiff's complaints and requests for a female uniform, name tag, and use of the female restroom were based on her gender. See Amended Complaint at ¶¶ 16, 18, 19, 28.

More importantly, Plaintiff has failed to identify any adverse employment actions taken by Cabela's in connection with or contemporaneous with her alleged request for accommodation. See Stranzl v. Del. County, Civil Action No. 13-1393, 2014 U.S. Dist. LEXIS 95475, at \*25-26 (E.D. Pa. July 14, 2014). Plaintiff has failed to identify any facts that demonstrate a causal connection between her alleged requests for accommodation and the termination of her employment. “[T]emporal proximity alone will be insufficient to establish the necessary causal connection when the temporal relationship is not unusually suggestive.” Simms v. Trimac Transp. East, Inc., Civil Action No. 08-2694, 2009 U.S. Dist. LEXIS 47569, at \*43 (E.D. Pa. June 8, 2009) (quoting Farrell v. Planters Lifesavers Co., 206 F.3d 271, 280 (3d Cir. 2000)).

Plaintiff's argument that she has alleged facts indicating a “pattern of antagonism” is meritless. A pattern of antagonism has been found where an employer “engaged in a ‘constant barrage of written and verbal warnings . . . inaccurate point totaling, and disciplinary action.’” Strawbridge v. Potter, Civil Action No. 08-2937, 2009 U.S. Dist. LEXIS 63740, at \*38 (E.D. Pa. July 22, 2009). Plaintiff's allegations that she was forced to wear a name tag labeled “James” and that she was not allowed to use the female restroom do not amount to a “pattern of antagonism.” See Opposition at p. 44. Furthermore, Plaintiff's acknowledgment that she was issued a new name tag after she legally changed her name and that she was permitted to use the unisex family restroom in response to her request to use the female restroom belies any suggestion of antagonism. Amended Complaint at ¶¶ 16, 31, 32.

As a result of the foregoing, Plaintiff has failed to state a retaliation claim under the ADA.

## II. CONCLUSION

Accordingly, for the foregoing reasons and for the reasons set forth in the Partial Motion of Defendant Cabela's Retail, Inc. to Dismiss Plaintiff's First Amended Complaint, Defendant Cabela's Retail, Inc. respectfully requests that, if the Court upholds the constitutionality of the ADA, Plaintiff's claims for disability discrimination, failure to accommodate, and retaliation arising under the ADA (Counts III and IV of the Amended Complaint) be dismissed, with prejudice, due to Plaintiff's failure to state a claim upon which relief can be granted.

Respectfully submitted,

FISHER & PHILLIPS, LLP

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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA**

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KATE LYNN BLATT,

Plaintiff,

v.

CABELA’S RETAIL, INC.,

Defendant.

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CASE No.: 5:14-CV-04822-JFL

**CERTIFICATE OF SERVICE**

I, Christin Kim, Esquire, hereby certify that on this 17th day of February 2015, a true and correct copy of the Reply Brief in Further Support of the Partial Motion of Defendant Cabela’s Retail, Inc. to Dismiss Plaintiff’s First Amended Complaint was filed electronically and is available for viewing and downloading from the Court’s ECF system and was served upon the following attorneys via the Court’s ECF system:

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