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Lorinz v. Turner Const. Co.
E.D.N.Y.,2004.
Only the Westlaw citation is currently available.
United States District Court,E.D. New York.
Barbara LORINZ, Plaintiff,
v.
TURNER CONSTRUCTION COMPANY, Defendants.
No. 00 CV 6123SJ.

May 25, 2004.

Law Offices of Lee Nuwesra, New York, New York, By: Jerald G. Abrams, for Plaintiff.
Peckar & Abramson, P.C., New York, New York, By: Gregory R. Begg, for Defendant.

MEMORANDUM AND ORDER

JOHNSON, Senior J.
***1** Plaintiff Barbara Lorinz ("Plaintiff") brings this action against Defendant Turner Construction Company ("Defendant") alleging violations of the Americans with Disabilities Act, 42 U.S.C. § 12112 et seq. (the "ADA"); the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA"); the New York State Human Rights Law, N.Y. Exec. Law § 290 et seq. (the "NYHRL") and the New York City Human Rights Law, N.Y.C. Admin. Code §§ 8-101 et seq. (the "NYCHRL"). Currently before this Court is Defendant's motion for summary judgment. For the reasons stated herein, the motion is DENIED.

FACTUAL AND PROCEDURAL BACKGROUND

In 1972, Plaintiff began her extensive career with Defendant. (Pl .'s Rule 56.1 Statement at ¶ H.) In 1987, Plaintiff became a full time project accountant. (*Id.*) Prior to her termination, Plaintiff was a project accountant assigned to the IS-5 School and New York Hospital of Queens construction projects. According to Defendant, Plaintiff was responsible for: (1) preparing monthly bills to clients; (2) preparing critical financial reports to the corporate office concerning the financial status of the projects assigned to her; (3) making monthly subcontractor payments; (4) making monthly vendor payments; (5) doing weekly payroll administration for Defendant employees at her assigned projects; and (6) managing the filing of all project related documents. (Def.'s Rule 56.1 Statement at ¶ 3.)

From 1995 until her termination, Tom Garcia ("Mr.Garcia") served as Plaintiff's supervisor. (*Id.* at ¶ 2). From the beginning of 1996, Plaintiff began to exhibit signs of depression at work, in which she would cry daily on and off for twenty minutes and would have difficulty concentrating. (*Id.* at ¶ 20.)In April 1996, as part of her performance review, Plaintiff received counseling and development concerning her computer skills in the Excel and Eaton computer software programs. (*Id.* at ¶ 21). Mr. Garcia was responsible for providing Plaintiff with individualized computer training in these programs. (*Id.*) During Plaintiff's training sessions, Mr. Garcia observed that "[she] would frequently cry and become unable to do her work."(Id. at ¶ 23.)In July 1996, Mr. Garcia "suggested" that Plaintiff take time off from work because of her difficulties. (*Id.*) On August 1, 1996, Plaintiff's father died. (Pl.'s Rule 56.1 Statement at ¶ 27.) Following his death, Plaintiff requested and was given the month of August off. (*Id.*) At the end of August, Plaintiff called and requested additional time off, to which she was given. From September 1, 1996 through March 3, 1997, Plaintiff received benefits and wages in accordance with Defendant's disability policies. (*Id.* at ¶ 28.)From August 1, 1996 to February 1997, Plaintiff called her supervisors to report on her medical status. (Def.'s Rule 56.1 Statement at ¶ 32.) Defendant contends that Plaintiff informed her supervisors that she was unable to return to work and was emotional and upset during these conversa-

tions. Plaintiff also submitted medical documentation concerning her mental capacity and her inability to work. (Pl.'s Rule 56.1 Statement at ¶ 29.)

***2** In February 1997, Plaintiff asked Mr. Garcia if she could return to work on a part-time basis. (*Id.* at ¶ 32.)Mr. Garcia responded that he would get back to her. (*Id.*) According to Mr. Garcia, Plaintiff was crying and emotional during this conversation, and when he asked if she was certain that she could return to work, Plaintiff stated that she did not know but would like to give it a try. (Def.'s Rule 56.1 Statement at ¶¶ 34-5.) Mr. Garcia then returned Plaintiff's call and informed her that Defendant did not have any part-time positions available and terminated her employment. (*Id.* at ¶ 34.)According to Plaintiff, Mr. Garcia informed her that she was being terminated for lack of work.[FN1] Defendant maintains that Plaintiff was terminated because she was incapable of returning to her former position and that no other positions were available. (*Id.*) One month later, Defendant hired John Episcopio ("Mr.Episcopio"), who was born on October 25, 1969, as Plaintiff's replacement. (Pl.'s Rule 56.1 Statement at ¶ 37.) Defendant eventually terminated Mr. Episcopio's employment because of his inability to meet the job requirements. (*Id.*) Plaintiff continued to receive disability benefits through June 1999. (Def.'s Rule 56.1 Statement at ¶ 41.)

> FN1. Defendant states that according to its policy at that time, employees unable to return after disability leave are classified as being released due to "lack of work" for the purpose of determining severance benefits entitlement and unemployment insurance eligibility.

In July 1997, Plaintiff filed a complaint with the New York State Division of Human Rights Division alleging disability and age discrimination. On or about April 2000, after an investigation, the New York State Division of Human Rights found that there is probable cause to believe that Defendant engaged in unlawful discriminatory practices relating to Plaintiff's claims. On October 12, 2000, Plaintiff filed the instant complaint. Defendant filed the instant summary judgment motion.

DISCUSSION

I. Summary Judgment Standard

A moving party is entitled to summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."Fed.R.Civ.P. 56(c); *seealso**Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The burden is on the movant to establish the absence of any genuine issue of material fact. *Celotex Corp.,* 477 U.S. at 323;*seealso**Goenaga v. March of Dimes Birth Defects Found.,* 51 F.3d 14, 18 (2d Cir.1995).

Once the movant has made a properly supported motion for summary judgment, the burden shifts to the nonmoving party to present "significantly probative" supporting evidence showing that there is a material factual issue for trial. *See**Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Summary judgment should be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial ."*Celotex Corp.,* 477 U.S. at 322;*seealso**Sim v. New York Mailers' Union No. 6,* 166 F.3d 465, 469 (2d Cir.1999).

II. ADA Claim

***3** Plaintiff alleges that Defendant discriminated against her in violation of the ADA by unlawfully terminating her employment and by failing to accommodate her disability. The ADA provides that "no employer covered by the Act shall discriminate against a qualified individual with a disability be-

cause of the disability of such individual in regard to ... the discharge of employees."42 U.S.C. § 12112(a)."A 'qualified individual with a disability' is 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).

To establish a prima facie case of discriminatory discharge under the ADA, an employee must show: (1) that [she] is an individual who has a disability within the meaning of the statute, (2) that an employer covered by the statute had notice of [her] disability, (3) that with reasonable accommodation, [she] could perform the essential functions of the position sought, and (4) that the employer has refused to make such accommodations." *Stone v. City of Mt. Vernon,* 118 F.3d 92, 96-97 (2d Cir.1997).FN2 The Second Circuit has held that "failure to make a reasonable accommodation, when the employee has satisfied the first three elements of his claim, amounts to discharge 'because of' his disability."*Parker v. Columbia Pictures Indus.,* 204 F.3d 326, 332 (2d Cir.2000) (*quoting Ryan v. Grae & Rybicki, P.C.,* 135 F.3d 867, 870 (2d Cir.1998)).

FN2. [Missing text].

A. Is Plaintiff disabled?

The ADA defines a disability as either: (1) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment. *See*42 U.S.C. § 12102(2). Plaintiff alleges that she satisfies each of the definitions.

i. Does Plaintiff's impairment substantially limit one or more of the major life activities?

To determine whether a plaintiff is disabled under the first subsection of the ADA's definition, the court must: 1) determine whether plaintiff has an impairment; (2) identify the life activity upon which plaintiff relies and determine whether it constitutes a major life activity under the ADA; (3) ask whether the impairment substantially limited the major activity identified. *See Colwell v. Suffolk County Police Dep't.,* 158 F.3d 635, 641 (2d Cir.1998). Plaintiff alleges that her impairment, consisting of major depression and anxiety, affected the major life activities of sleeping, concentrating, socializing, and caring for herself.

a. sleeping

Plaintiff alleges that her impairment affected her sleeping patterns. The EEOC guidelines provide that sleeping is not substantially limited just because an individual has some trouble getting to sleep or occasionally sleeps fitfully. *See* EEOC Psychiatric Guidance at Q & A 3 n. 16. In *Colwell,* after noting that difficulty sleeping is extremely widespread, the Second Circuit held that a plaintiff must show that his inability to sleep is substantial. 158 F.3d 635, 644 (2d Cir.1998). In granting summary judgment, the Court in *Colwell* noted that the plaintiff "made no showing that his affliction is any worse than is suffered by a large portion of the nation's adult population."*Id.* Here, Plaintiff asserts that she had difficulty sleeping at times and had difficulty waking up in the morning at other times. Although Plaintiff's sleep patterns were unstable, the Court finds that they were not significantly restricting as compared to a large portion of the nation's adult population.

b. concentrating

***4** Plaintiff further alleges that she was unable to concentrate most of the time and was only able to do so when she put her mind to it. Plaintiff asserts that she constantly had to read things twice to understand the words. The Court finds that Plaintiff's assertions regarding her inability to concentrate are not substantial enough. *See Glowacki v. Buffalo Gen. Hosp.,* 2 F.Supp.2d 346, 351 (W.D.N.Y.1998).

c. socialization

Plaintiff also alleges that she lost her ability to socialize. Plaintiff asserts that prior to her depression she went out on a regular basis, however, after her diagnosis her friends and family had to be force her to go to movies, dinner, or parties. Assuming that socializing is a major life activity, the Court finds Plaintiff's assertions insufficient to establish that she was substantially limited in her social interactions.

d. ability to care for herself

Lastly, Plaintiff alleges that she was not able to care for herself, to wit, bathing and eating. Plaintiff's temporary loss of her desire to bath and eat does not rise to the level of ADA disability. *See Herschaft v. New York Bd. of Elections,* No. 00-2748, 2001 WL 940923, at *4 (E.D.N.Y. Aug.31, 2001) ("sporadic lapses in ability to care for oneself does not constitute a substantial limitation")

Based on the foregoing, the Court finds that Plaintiff has not established that she has a physical or mental impairment that substantially limits the major activities of sleeping, concentrating, socializing, and caring for herself.

ii. Does Plaintiff have a record of disability?

The ADA's definition of disability can also be satisfied by "a record" of an impairment that substantially limits one or more major life activities. 42 U.S.C. § 12102(2)(B). For a person to have a record of disability under the ADA, he or she must have "a history of, or have been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities."29 C.F.R. § 1630.2(k). The intent of this provision, in part, is to ensure that people are not discriminated against because of a history of disability. *Id.*

Plaintiff contends that Defendant had a record of her disability based on her and her physician's periodic updates during her leave of absence. Although Plaintiff's and her physician's updates establish that Plaintiff has a mental impairment, Plaintiff has not shown that this impairment substantially limits one or more of her major life activities for the same reasons that were stated above.[FN3]

FN3. The Court notes that Plaintiff has not alleged that she was substantially limited in the major life activity of working for purposes of this subsection.

iii. Did Defendant regard Plaintiff as having an impairment?

"The third way to prove a 'disability' within the meaning of the ADA is to prove that the plaintiff is 'regarded as' having an impairment that substantially limits one or more major life activities."*Colwell,* 158 F.3d at 646 (*citing*42 U.S.C. § 12102(2)(C)). To be perceived as having a disability turns on the employer's perception of the employee and is therefore "a question of intent, not whether the employee has a disability."*Id.* (*quoting Francis v. City of Meriden,* 129 F.2d 281, 284 (2d Cir.1997)). In *Sutton,* the Supreme Court explained that an employee can be "regarded as" disabled in two ways: (1) a covered entity mistakenly believes that a person has a[n] impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment, substantially limits one or more major life activities." 527 U.S. 471, 119 S.Ct. 2139, 2149-50, 144 L.Ed.2d 450 (1999).

***5** Plaintiff claims that Mr. Garcia clearly "regarded her as having a disability that substantially impaired her ability to concentrate and to perform work."(Pl.'s Mem. of Law in Opp. to Summ. Judg. at 15.) Plaintiff points out that it was Mr. Garcia who told her to take time off and seek professional help based on his belief that her mental status was affecting her ability to learn the Excel and Eaton computer programs. Defendant asserts

that Plaintiff only claimed that she was perceived to be disabled based on it's failure to provide her with part-time work. Notwithstanding, Defendant contends that Mr. Garcia suggested that Plaintiff take time off from work and that she welcomed the idea. Defendant argues that it did not "perceive that Plaintiff was disabled," rather, "it simply perceived, correctly so, that it could not employee Plaintiff on a part-time basis."(Def.'s Reply Brief in Supp. of Summ. Judg. at 9.) Defendant further argues that regardless of any alleged perception, Plaintiff was medically unfit to return to work.

Although this is a close issue, the Court finds that Plaintiff has provided sufficient evidence to establish a prima facie case under § 12102(2)(c). The Court finds that a genuine issue of material fact exists as to whether Defendant regarded Plaintiff as having an impairment that substantially limits the major life activity of concentrating. The Court relies in large part on Mr. Garcia's suggestion that Plaintiff take time off from work based on her inability to concentrate.[FN4]

> FN4. Moreover, although not dispositive, the Court notes that throughout her disability leave prior to her termination, Plaintiff frequently spoke to Mr. Garcia, where she would exhibit behavior indicative of her depressed state. In fact, Mr. Garcia stated that she was crying and emotional when she requested to return to work on a part-time basis.

B. Qualified Individual with a Disability

Defendant argues that Plaintiff is not a qualified individual with a disability because she could not perform the essential functions of her job with or without an accommodation. *See*42 U.S.C. § 12111(8). Specifically, Defendant points out that Plaintiff: (1) exhibited performance deficiencies that required her supervisor to provide her with constant computer training prior to her leave of absence; (2) was found by a doctor to be unfit for employment in excess of two years; and (3) was crying and emotional when she requested a part-time accommodation and stated that she was unsure she would be able to perform her work if she returned. Defendant further points out that Plaintiff's treating physician testified that Plaintiff "hadn't achieved being free significant [sic] of the depression at the time of her dismissal from her work."(Def.'s Reply in Supp. of Summ. Judg. at 3.) Plaintiff contends that she had performed the essential functions of her employment prior to her disability leave and that she could have continued to do so if she was accommodated with part-time work.

The Court finds that prior to Plaintiff's disability leave in August of 1996, despite Plaintiff's deficiencies in learning the computer programs, a genuine issue of material fact exists as to whether she could perform the essential functions of her job. As persuasively pointed out by Plaintiff, her ability to perform her other job duties, to wit, dealing with supervisors, subcontractors, etc, did not require a proficiency in the Excel and Eaton computer software programs.

***6** The Court is also aptly aware of the caselaw that provides that an individual is not qualified for her position if she is unable to come to work. A review of the record in this case, however, reveals that Plaintiff consulted with her physician about returning to work and that her physician stated that she could return to work if her hours were reduced. Although Defendant correctly points out that Plaintiff's physician felt that she was not free from depression, the physician did not completely preclude the possibility of Plaintiff returning to work on a part-time basis.

With respect to Plaintiff's ability to perform the essential functions of her job given her uncertainty about returning to work and her inability to concentrate, as will be discussed in more detail *infra,* the Court finds that a genuine issue of material fact exists as to whether Plaintiff could perform the essential functions of her job with an accommodation despite her difficulties.

C. Reasonable accommodation

Plaintiff's bears the both the burden of production and persuasion that the accommodation she requested was reasonable and would have enabled her to perform the essential functions of her position. *SeeJakan v. New York State Dep't of Labor,* 205 F.3d 562, 566-567 (2d Cir.2000). Reasonable accommodations are "modifications or adjustments to the work environment or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position."29 C.F.R. § 1630.2(o)(1)(ii). The term essential function is defined as the "fundamental duties to be performed by the position in question ."29 C.F.R. § 1630.2(n)(1).

The Second Circuit has held that the "duty to make reasonable accommodations does not require an employer to hold open a disabled employee's position indefinitely, nor does it require the employer 'to investigate every aspect of an employee's condition before terminating him based on his inability to work." ' *Parker,* 204 F.3d at 338. The ADA does require that when an employee proposes an accommodation before termination, the employer is obligated to "investigate that request and determine its feasibility." *Id.*

Defendant argues that Plaintiff's request to work on a part-time basis is unreasonable because there were no part-time positions available. Defendant cites to numerous cases for the proposition that "a part-time assignment to a full-time job is not a reasonable accommodation as a matter of law because it inevitably requires the elimination or reallocation of essential functions, hiring of additional staff or transfer of essential functions to other employees."(Def.'s Mem. of Law in Supp. of Summ. Judg. at.) Even if it were required to accommodate Plaintiff with part-time employment, Defendant asserts that Plaintiff has not demonstrate that she could perform the essential functions of her position.

***7** Plaintiff counters that Defendant employees, including herself have routinely performed part-time work in the accounting department. Defendant notes that "after [her] motor vehicle accident in the mid 80's, [Defendant] accommodated [her] by allowing [her] to work part time for at least three months."(Decl. of Lee Nuwersra, Ex. A at 7.) Here, Plaintiff asserts that she only requested to be accommodated for a couple of weeks. Plaintiff further asserts that she suggested that she be assigned to the IS-5 project for three days out of the central office. Plaintiff avers that she was never given the opportunity to fully explain her abilities and condition because Defendant failed to engage her in the interactive process required under the ADA. *SeeJakan,* 205 F.3d at 566 ("the ADA envisions an 'interactive process' by which employers and employees work together to assess whether an employee's disability can be reasonably accommodated.").FN5

> FN5. Once an accommodation has been requested, the employer should "explore 'what limitations the employee has, ask the employee what he or she specifically wants, show some sign of having considered [the] employee's request, and offer and discuss available alternatives when the request is too burdensome." ' *Jacques v. DiMarzio, Inc.,* 200 F.Supp.2d 151, 170 (E.D.N.Y.2002) (*quotingTaylor v. Phoenixville Sch. Dist.,* 184 F.3d 296, 317 (3d Cir.1999)).

Defendant argues that Plaintiff's position is not conducive to part-time work. Defendant further argues that Plaintiff never requested that she be permitted to serve as project accountant for the IS-5 project for three days per week. Defendant "maintains that Plaintiff vaguely requested 'part time' in an unspecified capacity of indefinite duration without any other specifics."(Def.'s Reply Brief in Supp. of Summ. Judg., at 6 n. 2.) Nonetheless, Defendant alleges that the IS-5 project could not have been adequately managed by a project accountant working

only three days per week and that to do so, would serve as a elimination of an essential job functions, to wit, the New York Hospital of Queens project.FN6Moreover, Defendant contends that given Plaintiff's deficient computer skills and her inability to concentrate, sleep, and socialize, there is no way that she could have managed the IS-5 project on a part-time basis.

> FN6. A dispute exists as to whether Plaintiff actually made the request to specifically work at the IS-5 project part-time.

Defendant further contends that Plaintiff's assertion regarding past part-time work performed is insufficient because she failed to describe the facts and circumstances surrounding the accommodation. As a result, Defendant avers that it has no probative value in this case. Defendant alleges that it did engage Plaintiff in an extensive interactive process beginning with Mr. Garcia's suggestion that she take time off until the time of her accommodation request. Defendant further alleges that if the process was incomplete, Plaintiff has not shown that a complete interactive process would have resulted in her continued employment as it is undisputed that her mental status remained unchanged and that there were no part-time positions available.

Defendant repeatedly argues that Plaintiff was unable to work because "she was not medically qualified to work in any capacity" due to her inability to concentrate, etc. (Def.'s Reply Brief in Supp. of Summ. Judg. at 2.) Defendant points out that "at the time she made her accommodation request and for almost three years thereafter, Plaintiff was not medially fit to return to work."(*Id.* at 3.) As evidence of Plaintiff's inability to work, Defendant points out that Plaintiff often was emotional when she reported on her mental status and physician's reports were submitted acknowledging her inability to work. Although the weight of this evidence appears overwhelming, a closer review of the record reveals that a genuine issue of material fact exists as to whether Plaintiff was incapable of working. As stated above, although Plaintiff's treating physician expressed doubt regarding whether she was free from depression, he did not preclude the possibility of Plaintiff returning to work on a part-time basis. In fact, he and Plaintiff discussed the possibility of her return to work and determined that it was feasible under the appropriate conditions.

***8** Although this is an extremely close case and the Court finds that Defendant's arguments are not specious, after carefully examining the record and arguments presented, particularly Plaintiff's assertions regarding past part-time work performed, her physician's view that she could return to work if given reduced hours, and the dispute as to whether she requested to work at IS-5 part-time, the Court finds that a genuine issue of material fact exists regarding whether, with an accommodation of part-time employment, Plaintiff would have been capable of performing the essential functions of her job.FN7

> FN7. Although not addressed by counsel for either party, the Court notes that although there is some dispute as to whether "regarded as" disabled plaintiffs are entitled to reasonable accommodations under the ADA, the Court finds Judge Block's reasoning in *Jacques* persuasive that "regarded as" disabled plaintiffs are entitled to accommodations under the ADA. 200 F.Supp.2d at 163-171.

III. Disability claims under NYHRL

The elements of a prima facie case are also applicable under the NYHRL.FN8 *See* *Reeves v. Johnson Controls World Servs., Inc.,* 140 F.3d 144, 154-57 (2d Cir.1998). Because Plaintiff has established a prima facie case under the ADA, she therefore has established a prima facie case of discrimination under the NYHRL. This is especially true given that the definitions of disability are broader under the New York statutes than the ADA. *Id.*

> FN8. Defendant conceded that Plaintiff is disabled under the NYCHRL.

IV. Age Discrimination Claim

To establish a prima facie case of age discrimination, the Plaintiff must show (1) that she was in the protected age group; (2) that she is qualified for the position; (3) that she was discharged; and (4) that the discharge occurs under circumstances giving rise to an inference of discrimination.[FN9] Plaintiff argues that she was qualified for the position because she worked for Defendant for over twenty-five years and received favorable performance reviews. Plaintiff further argues that an inference of discrimination exists because she was replaced by a twenty-four year old man. Defendant contends that Plaintiff fails to show that she was qualified for the position and that her discharge occurred under circumstances giving rise to an inference of discrimination. The Court need not address Defendant's first argument because it finds that Plaintiff failed to show an inference of discrimination. The Second Circuit has held that the replacement of an older worker with a younger cannot, in itself, evince age discrimination. *See* *Norton v. Sam's Club,* 145 F.3d 114, 119-20 (2d Cir.1998).

FN9. There is no dispute that Plaintiff was in the protected age group and was discharged.

CONCLUSION

For the reasons stated herein, this Court denies Defendant's motion for summary judgment.

SO ORDERED.

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Not Reported in F.Supp.2d, 2004 WL 1196699 (E.D.N.Y.)

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