[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN PART 17

0106200/2002

MONTANEZ, WILFRED0
VS
N.Y.C.HOUSING AUTHORITY

INDEX NO. 106200-02

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

SEQ 1

SUMMARY JUDGMENT

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERS
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

CANNED SEP 18 2003

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached Memorandum Decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 9/14/03

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

EMILY JANE GOODMAN

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

----------X

WM, [1]

Plaintiff,

- against - Index No.: 106200/2002

NEW YORK CITY HOUSING AUTHORITY,

Defendants.

..... X

EMILY JANE GOODMAN, J.S.C.[2]

In this discrimination lawsuit, plaintiff (WM or plaintiff) claims that his employer, defendant New York City Housing Authority (NYCHA), pressured him into disability retirement because of a perception that he had AIDS. He also claims that NYCHA eliminated a reasonable accommodation of his other medical conditions, that he was constructively discharged, and that NYCHA retaliated against him. Pursuant to CPLR 3211 and 3212, NYCHA now moves for summary judgment dismissing the complaint.

BACKGROUND

WM was a NYCHA employee from February 1988 until March 2000. During his employment, he suffered from various medical problems, such as hepatitis, gastric ulcers, and migraines. In November 1992, he was diagnosed with HIV. It appears that WM did not inform NYCHA that he had HIV, though NYCHA was allegedly aware of his other medical conditions.

---

[1] Caption amended for publication.

[2] The Court would like to thank court attorney Richard Tsai for his invaluable contribution in the preparation of this opinion.

In 1997, WM requested and received a modified 4-day work week schedule to allow him to attend his regular medical appointments. In November 1999, he applied to the New York City Employees Retirement System (NYCERS) for disability retirement benefits. NYCERS approved the application, and NYCHA informed WM that his last day of work would be March 31, 2000.

According to WM, NYCHA pressured him into retirement because of a perception that he had AIDS. In 1993, his supervisors allegedly confronted him about whether he had AIDS. At weekly meetings, they purportedly told him that they did not believe his reason for requesting a reasonable accommodation, and accused him of having AIDS. Between 1997 and 1999, WM claims to have been harassed repeatedly about his medical condition and whether he was being honest with NYCHA. He also claims that his supervisors wrote, or threatened to write, false time and attendance memos for his personnel file, unless he retired. Moreover, he alleges that NYCHA removed his sick days and overtime to make it more difficult for him to complete his weekly assignments.

In 1998, WM complained to NYCHA's EEO office and to his union representative about the allegedly false memos and about the discrimination he allegedly experienced with respect to his reasonable accommodation. The following day, a supervisor allegedly demanded that he call a NYCHA director and tell her "everything was good." WM claims that he was sent for internal disciplinary action when he refused.

In April 1999, WM's supervisors allegedly informed him that NYCHA needed additional information to continue his modified work schedule. WM refused to provide the information, because he believed that NYCHA already had the appropriate medical documentation, and that NYCHA was intruding on his decision to keep private the fact that he had HIV.

On November 16, 1999, a supervisor allegedly threatened WM that he would place another "fictitious" time and attendance memo in his personnel file, but offered to destroy the memo if WM retired. That day plaintiff applied for disability retirement from NYCERS, claiming that he was overwhelmed with the pressure upon him to retire. On March 13,2000, NYCHA allegedly informed WM that it would no longer approve the days he would have for his medical appointments, and would no longer be approving his vacations. By a letter dated March 17,2000, NYCERS informed plaintiff that its medical board approved his application for disability retirement. The Social Security Administration also informed WM that he would be entitled to monthly disability benefits beginning in September 2000.

In February 2002, WM brought this action, alleging violations of the Americans with Disabilities Act (first cause of action), Executive Law § 296, part of New York State's Human Rights Law (third cause of action), New York State's Civil Rights Law § 40 (fourth cause of action), and the Administrative Code of the City of New York § 8-107, part of New York City's Human Rights Law (fifth cause of action).[3] Plaintiff contends that NYCHA discriminated against him by eliminating his reasonable accommodation, that he was constructively discharged, and that he experienced retaliation. The parties have since stipulated to dismissal of claims under the Americans with Disabilities Act with prejudice.[4]

DISCUSSION

The standards for summary judgment are well settled. The movant must tender evidence,

---

[3]The second cause of action appears to be duplicative of the other causes of action.

[4]Contrary to the verified allegations of the complaint, WM conceded that he had not filed a formal complaint with the Equal Employment Opportunity Commission, which is necessary prerequisite to bringing an ADA claim (see 42 USC §§ 2000e-5 [e] [1]) and 12117 [a]).

by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment" (CPLR 3212[b]; *Zuckerman* v *City of New York*, 49 NY2d 557, 562 [19801). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad* v *New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [19851). Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])" (*Zuckerman*, **49** NY2d at 562).

NYCHA argues that WM is judicially estopped from bringing this action because he applied for, and receives, Social Security disability insurance benefits and disability retirement benefits from NYCERS.[5] It also claims that it neither forced him to retire on disability, nor retaliated against him, and denies that it eliminated WM's reasonable accommodation. According to NYCHA, the only reasonable accommodation that plaintiff ever requested (and received) was a 4-day work week, which he continued to receive until he retired. Lastly, NYCHA argues that WM cannot reasonably perform the duties of his job, even with the accommodation granted, because he was excessively absent from the job.

Preclusion

Under state case law, it was true that a complainant who received disability leave from his employer could not assert a discrimination claim under the State's Human Rights Law *(see Matter of AT&T Bell Lab. v New York State Div. of Human Rights* (213 AD2d 230 [1st Dept 19951). When that case was decided, however, the statute applied only to disabilities that did not

[5] NYCHA uses the term judicial estoppel; however, preclusion is a more appropriate term.

prevent a person from reasonably performing the duties of the job, without reasonable accommodation. Thus, the Court in *Matter of AT&T Bell Laboratories* reasoned that a person who received benefits from its employer due to an inability to work could not later claim that s/he was, in fact, able to work. However, in 1997, the Legislature expanded the definition of disability, effective January 1, 1998, when it amended the State Human Rights Law to require reasonable accommodation (see, L 1997, ch 269, §§ 1, 5; *see* Executive Law § 292 [21]). Because *Matter of AT&T Bell Laboratories* was decided on a superseded definition of disability, its precedential value is uncertain. Indeed, more recently, the Appellate Division, Third Department, held that the application for, and acceptance of, disability benefits does not bar a discrimination claim *(see Novak v Royal Life Ins. Co. of NY*, 284 AD2d 892, 893 [3d Dept 20011 ["We do not feel that plaintiffs reaction to such a Hobson's choice may be viewed as conclusive evidence of disability"]).

In *Cleveland* v *Policy Management Systems Corp.* (526 US 795 [1999]), the Supreme Court of the United States addressed the issue of whether a plaintiff who received Social Security disability insurance (SSDI) benefits could nevertheless assert discrimination claims under the American with Disabilities Act **(ADA).** The Court reasoned that the two claims did not bear any conflict, because the Social Security Administration does not take into account the possibility of "reasonable accommodation" in determining **SSDI** eligibility. Nevertheless, the Court held that "a plaintiffs sworn assertion in an application for disability benefits that she is, for example, 'unable to work' will appear to negate an essential element of her **ADA** case--at least if she does not offer a sufficient explanation" *(id.* at 806).

In light of the unsettled state case law, this court will follow *Cleveland.*[6] Like the **ADA,** both the State's and City's Human Rights Laws require employers to make reasonable accommodations for a person with a disability *(see* Executive Law § 296 [3] [a]; *see* Administrative Code of the City of New York § 8-107 [15] [a]). Our courts have often followed and looked to federal standards in interpreting the Human Rights Laws *(see Ferrante v American Lung Assn.,* 90 NY2d 623,629 [1997]; *see Umansky v Masterpiece Intl. Ltd.,* 276 AD2d 692, 693 [2d Dept 20001).

NYCHA fails to demonstrate that WM's application for, and receipt of, disability retirement benefits from NYCERS inherently conflicts, as a matter of law, with his assertion that he could work, with reasonable accommodation. NYCHA focuses on the medical conditions that WM stated in his application to the NYCERS Medical board (Mem. at 6), but it does not show that NYCERS takes into account the possibility of any reasonable accommodation in determining an individual's inability to work. Because the inconsistency is not inherent, WM may defeat summary judgment by offering a sufficient explanation that would enable a reasonable juror to conclude that, "assuming the truth of, or the plaintiffs good-faith belief in, the earlier statement [of total disability], the plaintiff can nevertheless 'perform the essential functions of [his] job,' with or without 'reasonable accommodation"' *(see Cleveland,* 526 US at 807). WM claims that he filed for disability retirement when NYCHA allegedly used a variety of tactics to force him to retire. This explanation is sufficient because his inability to work is allegedly due to the employer's actions in creating an intolerable work environment, not to his

---

[6] The Court is aware of post 1998 cases which follow *Matter of AT&T Bell Lab., supra;* however those cases involve discrimination claims which occurred prior to the 1997 amendment *(see e.g. Dantonio v Kaleida Health,* 288 AD2d 866 [4th Dept 20011).

disability (*see Mulhern v Eastman Kodak Co.*, 191 F Supp 2d 326 [WD NY 20021). This explanation would not preclude WM from presenting evidence to the jury that, with reasonable accommodation, he was capable of performing the activities of his job (*see Parker* v *Columbia Pictures Zndus.*, 204 F3d 326, 335 [2d Cir 20001). Accordingly, the fact that WM applied for, and receives, disability benefits does not bar his discrimination claims because he offers a sufficient explanation that would enable a reasonable juror to conclude that he could nevertheless perform the essential functions of his job.

State Human Rights Law

Executive Law § 296 provides in relevant part that

> [i]t shall be an unlawful discriminatory practice . . . [f]or an employer or licensing agency, because of . . . disability . . . to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

The term disability is defined in relevant part in Executive Law § 292 as

> a physical, mental or medical impairment . . . or a condition regarded by others as such an impairment, provided, however, that in all provisions of this article dealing with employment, the term shall be limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held.

Accordingly, "[a] physical condition that prevents an employee from reporting to work and that requires an employee to miss an unacceptably high number of days of work is not a disability within the meaning of Executive Law § 292 (21)" (*Clark v Cargill, Znc., Flour Milling Div.*, 206 AD2d *870*, 870 [4" Dept 19941).

Here, NYCHA argues that WM cannot sustain an employment discrimination claim because he was excessively absent from work, despite his accommodation. However, the Court

finds that NYCHA fails to establish a prima facie case that WM was excessively absent from the job. NYCHA submits evidence that, from May to October 1999, WM allegedly used almost **22** days of annual leave, outside of his modified work schedule *(see* Murphy Affirm., Ex F). From November 1999 until March 2000, WM used a total of 34 additional days *(see id.*, Ex C [Master Time and Attendance Card]). However, NYCHA does not submit an affidavit from someone with personal knowledge explaining how the absences impacted plaintiff's ability to keep up with the demands of his position *(compare with Giaquinto v New York Tel. Co.*, 135 AD2d 928 [3d Dept 19871 [good attendance was necessary to provide services 24 hours a day, 365 days per year]; *see Cerruto* v *Durham*, 941 F Supp 388, 394 [SD NY 19961). Therefore, it does not necessarily follow that WM's absence from work meant that he did not have a disability protected under the State's Human Rights Law *(see Harbas* v *Gilmore*, 193 AD2d 553,553 [1st Dept 19931).

Additionally, the apparently high number of annual leave days is misleading, because it includes days that NYCHA had approved for vacation, which could be unrelated to WM's illnesses. Also, that number must be interpreted in context with his modified work schedule, which required him to work additional hours each day to make up for the Fridays off that he received *(see* Murphy Affirm., Ex B). As a result, it appears that WM was required to be at work on official holidays, but used his annual leave on those days instead of going to work *(see id.*, Ex C). Therefore, the number of annual leave days does not accurately reflect the impact of absences on his job.

As to the claims of constructive discharge, the court finds that an issue of fact exists as to whether NYCHA forced WM to retire on disability. An individual who claims constructive

discharge must show that the employer deliberately created working conditions so intolerable that a reasonable person in the individual's position would feel compelled to resign (see *Mountleigh v* ***City*** *of New* ***York,*** 191 AD2d 291 [1st Dept 19931;***Arendt*** v *Gen. Elec. Co.*, 305 AD2d 762, 761 NYS2d 334,337 n4 [3d Dept 20031). Here, NYCHA points out that the complaint mainly alleges incidents that occurred either on the day that WM applied for disability retirement from NYCERS, or after the application. Thus, NYCHA concludes that those incidents could not have compelled a reasonable person to leave the job. It also argues that WM could have filed a complaint with NYCHA or an administrative agency instead of leaving.

However, in opposition, WM offers additional incidents of alleged harassment that lead to his decision to retire. As discussed in the background, his supervisors allegedly called him a liar at weekly meetings, in that they did not believe his reasons for requesting a reasonable accommodation. They also allegedly confronted him about having AIDS. Between 1997 and 1999, NYCHA allegedly removed his sick days and overtime, and his supervisors allegedly threatened to write false time and attendance memos.

While a reasonable person would not be compelled to resign as a result of any single condition or incident, the cumulative effect of a number of adverse conditions may constitute constructive discharge (*Chertkova* v *Connecticut Gen. Life Ins.* Co., 92 F3d 81, 90 [2d Cir 19961 ["Because a reasonable person encounters life's circumstances cumulatively and not individually, it was error to treat the various conditions as separate and distinct rather than additive"]). Here, WM appears to contend that his supervisors were trying to coerce him into disclosing his HIV status, and that when their efforts were not successful, they resorted to more aggressive tactics. An otherwise innocuous request for additional medical documentation to justify reasonable

accommodations of WM's known illnesses could have been an underhanded attempt to learn of his HIV status. Thus, whether it was reasonable for plaintiff to retire on disability rather than to endure the allegedly constant prying into his HIV status is a question best left for trial. It is also an issue of fact whether WM retired as a last resort, because he claims that he complained to NYCHA and his union representative to no avail before he seeking retirement.

NYCHA attempts to refute plaintiff's assertion that NYCHA removed his sick days and threatened to write, or wrote, false time and attendance memos.[7] However, NYCHA recognizes that refuting the allegations by way of a reply has limited value, as plaintiff does not have the opportunity to respond.' While NYCHA also complains that the allegations of harassment are vague, NYCHA could have inquired into the allegations by deposing WM before it brought this motion.

As to plaintiff's allegations that NYCHA violated the State Human Rights Law by eliminating WM's reasonable accommodation, the record indicates that he continued to work on a 4-day schedule up until his last day of work (see Murphy Affirm., **Ex** C). Plaintiff's claim that his reasonable accommodation was eliminated "unofficially in April 1999" is unsubstantiated (see Opp. Mem. at 16). The fact that NYCHA requested additional documentation to renew his modified work schedule for an additional six months does not, without more, amount to elimination of his reasonable accommodation. WM does not contend that it was impossible to comply with the request. Therefore, the claims relating to the alleged elimination of his

---

'NYCHA claims that employees do not receive designated sick days, but may use annual leave for reasons including illness (Reply Mem. at 11 n **4).**

[8]Indeed, NYCHA declined to submit any affidavits from WM's supervisors, citing the "procedural posture of this matter" (Reply Mem. at 6 n 3).

reasonable accommodation are dismissed.

Plaintiff's retaliation claims are also dismissed, as NYCHA shows that he cannot establish a prima facie case of retaliation under the State's Human Rights Law. To establish a prima facie case of retaliation, plaintiff must show that (1) s/he has engaged in activity protected by statute, (2) the employer was aware that s/he participated in the protected activity, (3) s/he suffered from a disadvantageous employment action based upon the activity, and (4) there is a causal connection between the protected activity and the adverse action taken by the employer *(see Torge* v *New York Socy. for the Deaf,* 270 AD2d 153, 154 [1st Dept 20001; *Pace* v *Ogden Serv. Corp.*, 257 AD2d 101,104 [3d Dept 19991).

WM alleges that he was sent "for disciplinary action to Rhonda Khogan" the day after he complained to NYCHA's EEC Office and to his union representative about the allegedly false time and attendance Memos (Opp. Aff ¶ 8).[9] NYCHA argues that a retaliation claim based on these events is time-barred because they occurred in 1998. As NYCHA raises this argument for the first time in reply, the court cannot consider this argument on this motion *(Ritt* v *Lenox Hill Hosp.,* 182 AD2d *560* [1st Dept 19921).

Nevertheless, the actions of which plaintiff complains, such as scrutiny from his supervisors, requiring documentation for sick leave, and the act of being sent for disciplinary action to Rhonda Khogan, do not constitute adverse employment actions *(see Nicastro* v *Runyon*, 60 F Supp2d 181, 184 [SD NY 19991; *see Yerdon* v *Henry,* 91 F3d 370,378 [2d Cir 1996][filing

---

[9] WM also claims that one of the protected activities he engaged in was going to his medical appointments (Opp. Mem. at 23). However, a protected activity under the State's Human Rights law refers to a person's opposition to a discriminatory practice, or the filing of a complaint, testimony, or assistance with a proceeding pursuant to the Human Rights Law *(see* Executive Law §§ **296** [1] [e], [3-a] [c], [7]).

of internal union charges not yet adjudicated does not constitute adverse employment action]). Therefore, the claims of retaliation are dismissed.

City Human Rights Law

For the most part, the analysis of plaintiff's claims under the State's Human Rights Law holds equally true when analyzed under the City's Human Rights Law. Thus, the court dismisses the claims under the City's Human Rights Law that are based on allegations that NYCHA eliminated WM's reasonable accommodation and that NYCHA retaliated against him. However, the Court does not dismiss WM's discrimination claim under the City's Human Rights Law based on the allegations that he was constructively discharged. Nor does the Court dismiss WM's discrimination claim based on the allegations that his supervisors threatened to eliminate his reasonable accommodation given that interference with a person's rights under City's Human Rights Law through coercion, intimidation, or threats is itself a discriminatory practice that law (Administrative Code § 8-107 [19]).

Civil Rights Law

Finally, the fourth cause of action, for alleged violations of Civil Rights Law § 40, is dismissed. Plaintiff concedes that he did not give notice to the Attorney General when he commenced this lawsuit, which Civil Rights Law § 40-d requires *(see* Murphy Affirm., **Ex A** [Response to Interrogatories # 31]). The lack of notice therefore warrants dismiss of this cause of action *(Chun* ***Suk Bak*** *v Flynn Meyer Sunnyside,* 285 AD2d 523,523 [2d Dept 20011; *Silver v Equitable Life Assur. Socy. of the United States,* 168 AD2d 367 [1st Dept 1990]), which plaintiff himself recognizes as he does not oppose dismissal of this claim (Plaintiff's Opp Mem at **14).**

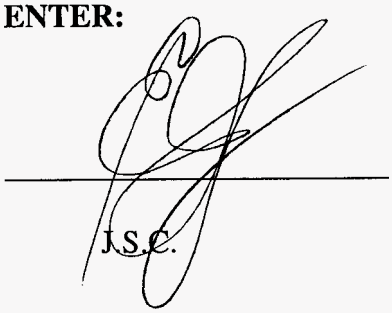
Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted to the extent that plaintiff's retaliation and reasonable accommodation claims are dismissed from the second, third, and fifth causes of action, and that the fourth cause of action is also dismissed; and it is further

ORDERED that the remainder of the action shall continue.

Dated: August **14,2003**

ENTER:



J.S.C.

EMILY JANE GOODMAN