

Shine v Roosevelt Hospital

2004 NY Slip Op 30042(U)

March 9, 2004

Supreme Court, New York County

Docket Number:

Judge: Shirley W. Kornreich

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: SHIRLEY WERNER KORNREICH
Justice J.S.C.

PART 154

0100257/1999

INDEX NO.

100257/199

SHINE, ROBIN
VS
ROOSEVELT HOSPITAL

MOTION DATE

3/19/04

ROOSEVELT HOSPITAL

MOTION SEQ. NO.

603

SEQ 03

MOTION CAL. NO.

The following papers, numbered 1 to 9 were read on this motion to/for

Sellwarty Judgment

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...
Answering Affidavits -- Exhibits _____
Replying Affidavits _____

1-4
5-8
9

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Decision, Order and Judgment.

FILED
MAR 22 2004
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____

Dated: _____
Check L DISPOSITION NON-FINAL DISPOSITION

SHIRLEY WERNER KORNREICH
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 28

-----X
ROBIN SHINE,

Plaintiff,

Index No. 100257/99

-against-

**DECISION, ORDER and
JUDGMENT**

ROOSEVELT HOSPITAL, SHEILA WARD,
and MICHELLE FLOURNEY,

Defendants.
-----X

SHIRLEY WERNER KORNREICH, J.:

This is **an** action for damages pursuant to New York State and New York City anti-discrimination laws arising from the removal by defendant Roosevelt Hospital (“defendant,” “Hospital” or “Roosevelt”)’ of plaintiff Robin Shine (“plaintiff” or “Shine”) from its Operating Room Technician (“OR Tech”) training program based upon her disability (four fingers missing from her left hand). Discovery is now complete, and the defendant **has** moved for summary judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND:

According to plaintiffs own affidavit in opposition to defendant’s motion, on August 3, 1989 plaintiff (dob July 27, 1959), while working as a paramedic, was in an accident in which she lost the four digits (but not the thumb) on her left hand. She was subsequently fitted with a prosthetic device, and continued to work **as** a paramedic.

In 1993, plaintiff, with her prosthetic left hand, **was** hired by defendant to work **as** a per

¹By Order of the Supreme Court, New York County (Bransten, J.), all claims against the individually named defendants, Sheila Ward **and** Michelle Flourney, were dismissed. See Exhibit B to defendant’s motion. Accordingly, Roosevelt is the sole remaining defendant.

diem paramedic in its ambulance corps. In September 1994, the Hospital promoted plaintiff to a full-time paramedic position. Plaintiff worked successfully with Roosevelt's ambulance corps until early 1998, when Roosevelt shut **down** its ambulance corps and all of its paramedic positions. The released paramedics, including plaintiff, were encouraged to apply for other positions at the Hospital, and Shine, along with several others, applied for the position of Operating Room Technician ("OR Tech").

According to the allegations in the Complaint, Shine began the four-month training program for the OR Tech position on February 4, 1998. After only one or two days of lectures, however, Shine was taken out of the training program and given tests on, e.g., her manual dexterity with assorted objects and instruments that she might be called upon to use in the operating room. It is Shine's contention that this was a full-fledged "OR Tech" test, and that it was **unfair** that only she **was** removed from the program and so tested before the full four months of instruction and training were complete. She further alleges that the testers insisted that she use her damaged hand in prejudicial ways rather than evaluating whether she could perform the same procedures with a modified technique, by using her "good" hand and/or by using both hands. Finally, it is Shine's position that notwithstanding these difficulties, she performed well on most of the tests and could have performed even better had she been given the full course of instruction and training. Plaintiff contends that the administrators of the exam (including nurse Lisa Dodd) were being untruthful when they averred that she had failed at essentially every task given to her, **and** that she would "likely cause death" if allowed to work in **an** operating room. See defendant's Exhibit I.

In a Memorandum dated February 26, 1998, the Hospital's Director of Labor Relations,

Lewis Archer, informed Shine that he had determined that she could not “perform the essential functions of the OR Tech job,” citing specifically her alleged failure “to achieve and maintain a proper scrub condition” as well as her purported inability “to handle surgical instruments with sufficient dexterity and speed.” See plaintiffs opposition papers, Exhibit C. Mr. Archer explained that the decision had been arrived at only following “an evaluation by ... the Hospital’s Director of Occupational Therapy,” a consultation with the “Association of Operating Room Nursing and other Operating Room personnel,” and “input from Local 1199.” None of these individuals or entities had been able to assist the Hospital in devising “a successful accommodation.” Archer invited Shine to apply for any other in-hospital job for which she believed herself to be qualified, including the position of Electrophysiology Tech. Id Plaintiff was ultimately offered, and in May 1998 accepted, a position as a medical office assistant (“MOA”), and remained in that job until October 4, 1999, when she went out on “sick leave” and, subsequently, voluntarily resigned.²

On or around January 28, 1999, plaintiff commenced an action against the Hospital and its administrators, Ward and Flourney, alleging that she had been denied an opportunity to participate in the OR Tech training program and to become an OR Tech because of her disability, in violation of New York State and New York City anti-discrimination statutes. See Executive Law §§290 et seq. [New York’s “Human Rights Law”] and N.Y. Comp. Codes Rules & Regs. Title 8, §§8-102 et seq.

² According to plaintiffs own account, after leaving Roosevelt Hospital, she attended nursing school, graduating from Queensboro Community College with an RN degree in June 2001. She is currently employed as an Emergency Room Nurse in the Holy Cross Hospital in Silver Spring, Maryland.

II. DISCUSSION:

As Justice Bransten pointed out in her Decision and Order dated December 14, 1999, deciding defendants' prior motion,

The New York State and New York City anti-discrimination statutes parallel the federal anti-discrimination statute, thus the burdens of proof are the same with respect to disability claims under Executive Law §296, N.Y. Comp. Codes R. & Regs. Title 8,, §8-102 *et seq.* and the Americans with Disabilities Act, 42 U.S.C. §12101 [*sic*] *et seq.* See *Ferrante v. American Lung Assn.*, 90 N.Y.2d 623,629 (1997); *Sogg v. American Airlines*, 193 A.D.2d 153, 155 (1st Dept. 1993); *Aquinas v. Federal Express Corp.*, 940 F.Supp. 73, 78-79 (S.D.N.Y. 1996).

Id. at p. 4. Moreover, in the employment context, it has been held that New York's intention in enacting its Human Rights Laws was to "enact a definition of disability coextensive with comparable federal statutes" – although the sweep of New York's law is somewhat broader. See Burton v. Metropolitan Transportation Authority, 244 F.Supp.2d 252,257 (S.D.N.Y. 2003).

There is in addition no substantive difference between the rights granted under the New York City Civil Rights Law and those accorded under the New York State Human Rights Law. See Mohamed v. Marriott International, Inc., 905 F.Supp. 141 (S.D.N.Y. 1995), citing Pace University v. New York City Commission on Human Rights, 200 A.D.2d 173 (1st Dept. 1994, rev'd on other grounds, 85 N.Y.2d 125 (1995)). Under all of these laws, it is illegal to discriminate against any person in the terms and conditions of employment on the basis of his or her disability. See Bickerstaff v. Vassar College, 196 F.3d 435,445 (2d Cir. 1999); U.S.C.A. §12101 *et seq.*; New York Executive Law §290 *et seq.*; N.Y.C. Admin. Code Title 8-101 *et seq.*

As plaintiff points out, defendant's burden on the instant motion is to prove that no issue of fact exists under four different theories of employment discrimination. The four theories are: (1) the "pretext" theory, in which plaintiff alleges that she has suffered an adverse employment

action because of her membership in the protected class; (2) the “mixed motives” theory, according to which plaintiff need only show that “discrimination” played a role in the employment decision; (3) the “disparate impact” theory, where a facially neutral practice has the effect of eliminating a person or group; and (4) the “reasonable accommodation” theory, which requires that an employer not take adverse action against a plaintiff where plaintiff would be able to carry out the “essential requisites of the job” with a reasonable accommodation.

It is not disputed that Shine suffers from a “disability” within the meaning of the Human Rights Law, that her employer is prohibited from discriminating against her because of it, and that such discrimination would be unlawful. See Executive Law §296(1)(a), (1-a)(b) and O); N.Y.C.Admin. Code 8-107(1)(a) and (2).

However, an employer may legitimately refuse to hire a candidate if the candidate’s disability prevents her from “performing in a reasonable manner the activities involved in the job or occupation sought ...” Executive Law §292(2 1); Matter of Antonsen v. Ward, 77 N.Y.2d 506, 513 (1991). Should the employer make an individualized showing that the particular candidate cannot reasonably perform the specific activities involved in the job at issue, it will have established a complete defense to all of the foregoing theories of employment discrimination. See Matter of Miller v. Ravitch, 60 N.Y.2d 527 (1983); Pageau v. Tolbert, 304 A.D.2d 1067 (3d Dept. 2003). “This requires an individualized determination that the particular disability affects the individual in such a way as to prevent him or her from performing in a reasonable manner the specific activities involved in the position at issue.” Pageau v. Tolbert, supra, at 1068.

In numerous sworn and unsworn, expert and lay statements, the Hospital has advanced its position that Shine could not reasonably perform the specific activities involved in the OR Tech

* 7]

position, principally (although not exclusively) because (1) she would not be able to maintain a sterile field, and (2) she could not handle the assorted surgical instruments involved in the work with sufficient dexterity and speed to ensure the smooth running of the various kinds of surgeries performed in the OR (e.g., she would be unable to hand surgical instruments to the surgeon from either side of the operating field with the requisite assurance and rapidity). The evidence submitted by defendant supporting these assertions includes the following: (1) an Affidavit from Lola Chlupsa, CNS, CNOR, a clinical nurse specialist and licensed RN since 1954 (defendant's Exhibit K); (2) the deposition testimony of OR Director/Clinical Coordinator/Head Nurse Sheila P. Ward (defendant's Exhibit L at pp. 10, 16, 58, 119-124, 155); (3) the deposition testimony of defendant's Director of Labor Relations, Lewis Archer (defendant's Exhibit M at pp. 68-74); (4) the deposition testimony of Michelle Flourney (defendant's Exhibit N); (5) the deposition testimony of Audrey Ehrmann (defendant's Exhibit P); (6) an affidavit from Jane Bear-Lehman, Ph.D., OTR, analyzing the standards required for a job as an OR Tech, the tests performed on plaintiff to measure her ability to meet these standards, and her own concurrence in the Hospital's determination that plaintiff could not satisfactorily perform the tasks required of an OR Tech (defendant's Exhibit H).

The above-listed witnesses aver that it was because of these concerns about Shine's manual dexterity and ability to maintain a sterile field that she was taken out of the OR Tech Training Course and examined for her basic physical capacity to perform the duties of an OR Tech. See deposition testimony of Michelle Flourney, Exhibit N to defendant's motion; see also Pageau v. Tolbert. supra (prospective employer, Department of Corrections, was not required to allow applicant, who was medically disqualified from position of correction officer, to enter

* 8]

correction officer academy or to fashion tests simulating actual job duties before determining that applicant could not reasonably perform duties of correction officer). The “test” devised by defendant’s staff was in fact a two-part evaluation of whether the Hospital’s patients’ safety and welfare concerns could be reconciled with plaintiffs placement in the OR Tech program. This evaluation included an assessment of plaintiffs manual hand dexterity by Audrey Ehrmann, the Hospital’s Director of Occupational Therapy, and a “situational assessment” (i.e., simulated OR work) conducted by experienced OR nurses, Sheila Ward and Lisa Dodd. All found that Shine’s disability disqualified her for OR work. See, e.g., defendant’s Exhibits L at pp. 46-56, 77; P at p. 49; I at pp. 4, 51-55.

The Hospital’s witnesses further related how they conferred with other members of defendant’s staff as well as with outside organizations -- including the Association of Registered Nurses (“AORN”)-- for recommendations regarding, e.g., alternative scrubbing techniques that plaintiff could use; but no one could identify an “accommodation” that could “reasonably” eliminate the patient care concerns. See Exhibits G at p. 183; LL at 143-163; M at pp. 68-70; N at pp. 111, 114-116, 165-166; O at 52. Some of the impediments to plaintiffs hiring were discussed with plaintiff herself, who, inter alia, refused to subject her prosthesis to autoclaving. It was plaintiffs position that her prosthesis would be sufficiently sterile if she disinfected it in a solution overnight. However, defendant’s experts testified that the mere process of securing the prosthesis to her arm would contaminate it because plaintiff would have to use her ungloved right hand to do so. Accordingly, proper sterility could not possibly be maintained. See defendant’s Exhibits G at pp. 178, 227-229; L at pp. 132, 141-142, 154-164; M at p. 73.

The deposition testimony of Ehrmann, Ward, Flourney and Dodd is entirely consistent

with the report issued by Labor Relations Director Archer on February 18, 1998 -- following his own "hand evaluation" of plaintiff earlier that same day -- which reads, in pertinent part:

- The lacking of manual dexterity in the left hand with or without the prosthesis.
- No in hand manipulation. Patient compensates primarily with lateral prehension only.
- Robin uses her left hand primarily as a stabilizer during bi-manual fine motor tasks, such as cutting with scissors, opening containers, threading a needle. (In other words, she can do these skills bimanually, however, she requires increased time to do so, along with compensatory strategies.) One compensatory technique that she uses is that she will rotate her arm or body to allow for the proper direction **and** manipulation of each object, **and** the other is that she stabilizes against **an** external object. An example is that she had difficulty taking out the tray without touching other things, since she is so used to compensating via stabilizing proximally against her body, against a table or some other external force....
- Another strategy is that she constantly switches hands to allow her to use her right hand **as** the dominant mobilizer.
- Another difficulty was in the picking up of small objects. This was inconsistent. Sometimes she did, and sometimes she dropped the object. The easiest way for her to pick up small objects is to slide them off the edge of a table.
- She also drops objects once they are picked **up**, again this is inconsistent. (In other words sometimes she won't drop items).
- Robin has no real grip strength or **grasp** motion, however, she does have a lateral pinch strength (with and without the prosthesis) that she compensates with. In her right unaffected arm, her lateral pinch is 20 pounds, and in the **left** with the prosthesis, it is 10 pounds. Without the prosthesis it was also **10-12** pounds.
- It appears that there may be a problem with the sterile procedure standard protocol, regarding the prosthetic device and donning of the gown and gloves....
- Her difficulty is not the strength issue, in **as** much **as** it is in the dexterity issue.
- **As** we all observed, she is quite resourceful with respect to figuring out how to do many tasks....

See plaintiffs Exhibit J. However, **as** other witnesses for defendant have repeatedly averred, it is essential for an OR Tech to be able to be bimanually dexterous (e.g., to help a nurse or surgeon with one hand while assembling **an** instrument with the other); to be secure in her ability to pick **up** and deliver small **as** well as large objects; and to at all times maintain a sterile field. See, e.g., deposition testimony of Sheila Ward at 61-62, 119-124.

In opposition to this overwhelming showing that plaintiff's disability would not have allowed her to "perform in a reasonable manner the activities involved in the job or occupation sought," plaintiff has submitted no opposing expert's affidavit. That is, there is no admissible evidence before the court establishing that the dexterity and sterility requirements of an OR Tech's position are different than as represented by defendant's experts, or that plaintiff herself, upon being tested, can in fact perform with the requisite agility and antiseptic sterility all of the tasks required of an OR Tech.³ Instead, plaintiff herself submits a self-serving affidavit in which she describes, inter alia, her current success as an ER nurse (not, to the best of the Court's understanding, the same thing as being an OR nurse – nor does plaintiff submit an expert's affidavit averring that the jobs are comparable); and she appends to her opposition papers unsworn testimonials from, inter alia, former patients and co-workers praising her professional abilities. See plaintiff's Exhibit G. These submissions do not suffice to defeat defendant's showing of entitlement to judgment as a matter of law.

The remainder of plaintiff's opposition consists in arguments by counsel to the effect that defendant's witnesses are not credible because, e.g., they did not work hard enough to fashion an "accommodation." Among other things, counsel complains that Archer spoke with only one Union 1199 official; that Ward could not identify the individual with whom she spoke at AORN; that Ehrmann was more focused on plaintiff's disability than on her ability to function; and that neither Chlupsa nor Bear-Lehman examined the plaintiff. See Rich Affirmation in Opposition at pp. 9-15. These protestations by counsel do not suffice to raise a triable issue of fact sufficient to

³An opposing affidavit similar to that submitted for defendant by Dr. Bear-Lehman would have sufficed,

defeat defendant's showing that an OR Tech's position requires **an** ability to perform certain tasks that plaintiff could not reasonably carry out.

Finally, defendant's record establishes that the Hospital's actions were not fueled by discriminatory motives. See Siano v. Dolce, 256 A.D.2d **582** (2d Dept. 1998); cf. Matter of McEniry v. Landi, 84 N.Y.2d 554 (1994); Maloff v. City Commission on Human Rights, **46** N.Y.2d 908 (1979). Defendant hired plaintiff when she **was** already disabled; promoted her while she was disabled; offered her alternative employment (which she accepted) when her original position was phased out; **and** never fired her. This is not a record from which a discriminatory motivation can be inferred, and plaintiff has not remedied this deficiency in her case by identifying any behavior by defendant from which a rational trier of fact could conclude that defendant was influenced by a discriminatory animus.

It is well established that summary judgment should be granted where the movant establishes its entitlement thereto, **and** the opposing party fails in opposition to raise any genuine issue of material fact. See Sirota v. New York City Board of Education, 283 A.D.2d 369 (1st Dept. 2001). Here the evidence adduced by defendant, including by several "experts" on OR Tech-requirements, establishes that Shine's disability would have prevented her from "reasonably" performing the tasks of an OR Tech. This showing is un rebutted by any opposing averments from comparable expert witnesses supporting the plaintiff's position. See, e.g., Shannon v. New York City Transit Authority, 189 F.Supp.2d **55** (S.D.N.Y. 2002), aff'd **332** F.3d **95** (2003). Plaintiff has also failed to present cognizable evidence rebutting defendant's showing that its efficiency, sterility, and general safety concerns alone sufficed to justify its refusal to hire plaintiff as an OR Tech, without any need for recourse to a "discrimination" rationale.

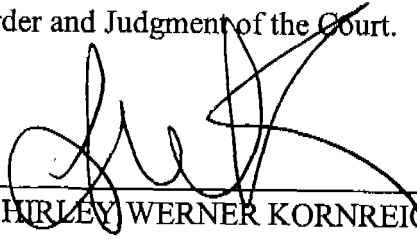
Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

The foregoing constitutes the Decision, Order and Judgment of the Court.

Date: March 9, 2004
New York, New York



SHIRLEY WERNER KORNEICH

FILED
MAR 22 2004
COUNTY CLERK'S OFFICE
NEW YORK